

COURT OF COMMON PLEAS  
BUTLER COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

VON CLARK DAVIS,

Defendant.

Case No. CR-1983-12-0614

CA-09-10-263

FILED BUTLER CO.  
COURT OF APPEALS

HONORABLE ANDREW NASTOFF

JUL 08 2010

CINDY CARPENTER  
CLERK OF COURTS

**ORIGINAL**

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

December 4, 2007

JILL M. CUTTER, RPR  
(513) 785-6596

(14)

1 APPEARANCES:

2  
3 On behalf of the plaintiff:

4 MICHAEL A. OSTER, JR., ESQ.  
5 Assistant Butler County Prosecuting Attorney  
6 11th Floor  
315 High Street  
Hamilton, Ohio 45011

7  
8 On behalf of the defendant:

9 MELYNDA COOK-REICH, ESQ.  
10 Repper, Pagan, Cook  
1501 First Avenue  
Middletown, Ohio 45044  
and

11 RANDALL PORTER, ESQ.  
12 Assistant State Public Defender  
250 East Broad Street  
Suite 1400  
13 Columbus, Ohio 43215

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
JILL M. CUTTER, RPR  
(513) 785-6596

## Transcript of Proceedings

## Afternoon Session

-----

THE COURT: All right. We're on record in State of Ohio vs. Von Clark Davis. This is CR83-12-0614. Let the record reflect that Von Clark Davis appears with counsel Randall Porter and Melynda Cook-Reich. Representing the State of Ohio at today's hearing is assistant prosecuting attorney Michael Oster. Before we begin, counsel, I do have the certification that needs to be sent to the Supreme Court on appointments. Ms. Cook-Reich stopped by earlier to sign, but Mr. Porter we would need your signature on there as well indicating that you have indeed accepted appointment on to the case. Thank you, and we will see that that gets appropriately sent off to the Supreme Court.

01:47PM

For the record, this is Ms. Cook-Reich's first appearance on this matter. We did have a hearing yesterday over the lunch hour at which time we addressed the issue of Mr. Komp's situation, and as I stated at that time if Mr. Komp wishes to petition the Court in some way to seek certification so that he can participate in that manner in the case, he is welcome to do so and the Court will take whatever steps we can take to facilitate that; whatever would be appropriate.

01:47PM

JILL M. CUTTER, RPR  
(513) 785-6596

1 Also, whatever his relationship is with Mr. Davis,  
2 obviously, if he wants to continue to participate on  
3 his own right without having been appointed, that is  
4 really a matter between him and Mr. Davis and you all I  
5 assume. So I just wanted to state that for the  
6 record.

7 One of the issues that we left off with yesterday,  
8 we did have a hearing with Mr. Davis regarding the  
9 waiver of time requirements in the case, and we went  
10 over that on the record to some degree with the  
11 assistance of Mr. Porter. However, what the Court was  
12 concerned about the applicability of the standard  
13 speedy trial waiver forms that we have in cases, and  
14 whether that -- and thought that that would probably  
15 not be an appropriate form to use in this case, and so  
16 I indicated that we would follow-up today.

01:47PM

17 I worked with my staff attorney and came up  
18 somewhat of a form. There was a form presented by Mr.  
19 Oster that looked like it had some good language, which  
20 I incorporated. I am not sure if the defense has  
21 something but if the defense would like to take a look  
22 at this hybrid form that we have come up with now to  
23 see if that would satisfy your concerns. Mr. Oster,  
24 you probably need to look at that as well. Why don't  
25 we take a moment, first of all, counsel look that over

01:47PM

JILL M. CUTTER, RPR  
(513) 785-6596



1 and see if you think it suffices for the situation and  
2 if you think that it is legally sufficient, then you  
3 can discuss with Mr. Davis whether he wishes to again  
4 -- yesterday he indicated a willingness to waive these  
5 rights, but whether he wishes to do so in writing.

6 MS. COOK-REICH: Do you want me to have Joe make a  
7 copy of this so Mr. Oster can look at this at the same  
8 time?

9 THE COURT: Yeah, why don't we do that. while  
10 that copy is being made -- and again that may be too  
11 early, I don't imagine counsel has had a whole lot of  
12 time to speak and game plan strategy, legal strategies,  
13 things like that, but I was going to ask Mr. Porter,  
14 Ms. Reich, whether at this point in time you  
15 anticipated litigating the issue of how a three-judge  
16 panel would be selected.

17 I understand we may -- you know, there is still a  
18 question. I am not asking you to waive any issues you  
19 may have about litigating whether it should be a jury  
20 or a three-judge panel, but as in any case, we will,  
21 well before that issue is determined, do the draw for  
22 the three-judge panel so that defense counsel knows who  
23 those judges would be. And so I guess I was wondering  
24 if you knew whether you were going to litigate whether  
25 it should be a random draw or not. And if you were not

01:48 PM

01:49 PM

JILL M. CUTTER, RPR  
(513) 785-6596

1 going to litigate that issue, I was going to propose  
2 that we go ahead and draw the names of the proposed  
3 panel while we are here today, so that you would have  
4 that information and I could get that information out  
5 to the other judges as expeditiously as possible.

6 MS. COOK-REICH: Your Honor, at this time  
7 Mr. Porter and I have only had a brief amount of time  
8 to talk in regards to becoming familiar with the case.  
9 I have done nothing other than read the District  
10 Court's decision. We would like to ask to do that at  
11 another time. Apparently, there is also documents that  
12 we are going to get shipped to us and we would like the  
13 opportunity to review those.

01:50PM

14 THE COURT: Understood. I just wanted to see if  
15 you could affirmatively rule it out. And what you are  
16 saying is at this point it's too early to affirmatively  
17 ruling out litigating that issue?

18 MS. COOK-REICH: Yes, Your Honor.

19 THE COURT: Fair enough. Why don't you go ahead  
20 and look over the time waiver form, first of all, as to  
21 whether it appears to be legally sufficient to  
22 accomplish the purpose that it is purported to  
23 accomplish.

01:50PM

24 MR. PORTER: Mr. Davis has had opportunity to  
25 review that and I believe Mr. Porter had gone over a

JILL M. CUTTER, RPR  
(513) 785-6596

1 similar form with him at the jail yesterday and I  
2 believe that we would be willing to sign this.

3 THE COURT: First of all, you are indicating that  
4 in defense counsel's opinion, it is a legally  
5 sufficient document to accomplish the waiver of time  
6 that we are addressing here at this hearing?

7 MS. COOK-REICH: That's correct, Your Honor. And  
8 Mr. Porter has gone over it more extensively with Mr.  
9 Davis in regards to the necessity that as we are going  
10 to be having a new hearing on this case, we would like  
11 to have the opportunity to actually prepare for that  
12 and not move it so fast that Mr. Porter and I are not  
13 prepared to do so.

01:53PM

14 THE COURT: Sure. All right. Mr. Oster, I  
15 believe that it is substantially similar to what you  
16 had put together, so --

17 MR. OSTER: It is, Your Honor. The only addendum  
18 I would possibly make, and after I had sent my proposed  
19 time waiver to both the Court and to defense counsel, I  
20 did add five sentences in -- or I am sorry -- five  
21 words in. I apologize for scaring the Court with five  
22 sentencing. At the very last paragraph after the word  
23 federal courts there is a comma and any other speedy  
24 trial, I added in the words and/or speedy resentencing  
25 rights to reflect what this Court talked about

01:53PM

JILL M. CUTTER, RPR  
(513) 785-6596



1 yesterday as to any case law that may have to deal with  
2 speedy resentencing or anything else. The State may  
3 just make the request that not only speedy trial but  
4 and speedy resentencing rights be added to that part  
5 so that we are properly reflecting what is going on  
6 here and reflecting what we did talk about yesterday.  
7 That would be my error of omission. I apologize to the  
8 Court for that.

9 THE COURT: It's all right. And, you know, for  
10 the record, the document obviously will be in the  
11 record and will speak for itself and it does reference  
12 resentencing earlier in the document, but does the  
13 defense have any objection to adding those words in the  
14 second to last line right after speedy trial right  
15 and/or just -- what is it and/or --

01:54 PM

16 MR. OSTER: And/or speedy resentencing rights.

17 MS. COOK-REICH: No, Your Honor. We have no  
18 objection to that. We just want to make sure that this  
19 limiting the fact of the time waiver to the fact that  
20 we are just waiving the time for the speedy trial  
21 purposes and we are not limiting any other issue that  
22 we might be raising relative to the case.

01:55 PM

23 THE COURT: Right. We're not going to set it, you  
24 know, Star Trek time or anything like that. We are  
25 going to still want to move forward as expeditiously as

JILL M. CUTTER, RPR  
(513) 785-6596



1 possible. This is intended simply to allow the Court  
2 to be able to make scheduling decisions based on the  
3 attorneys' calendars and the attorneys' opinion on how  
4 long it would take them to properly prepare to be able  
5 to go forward on the myriad of issues that may present  
6 themselves and for the Court to be able to make those  
7 scheduling decisions without concern that we are  
8 violating the defendant's rights in some other way.  
9 And that is really the only reason that we are, I  
10 guess, beating on this horse. Fair to say? Why don't  
11 we go ahead and add that. Unfortunately, my judicial  
12 assistant had to leave early today due to a family  
13 emergency and so I am going to have to see if my staff  
14 attorney can quickly put that together. Print it back  
15 out and then we will have him make that small change  
16 and we will be able to hopefully put this issue to  
17 rest.

01:56PM

18 well, while we are waiting on that, what other  
19 issues did we want to address today? We do at least --  
20 we have accomplished having both attorneys here present  
21 on the case, and that is no small task, so we are glad  
22 that we are able to move forward in that regard. It  
23 appears that we are going to have the time issue  
24 resolved. What is counsel seeking by way of further  
25 scheduling on this matter today?

01:57PM

JILL M. CUTTER, RPR  
(513) 785-6596

1 MS. COOK-REICH: Your Honor, Mr. Porter and I  
2 discussed that briefly given lack of information and  
3 knowledge we have of the case, what we would like to do  
4 today is set another pretrial date and then from there  
5 hopefully we can determine what issues we might be  
6 pursuing and what other further motion hearing dates we  
7 might need.

8 THE COURT: I will also indicate -- and Mr. Oster  
9 yourself as well?

10 MR. OSTER: The only thing the State would like to  
11 bring up as we say we are beating a dead horse, I say  
12 this every time we are here, but with both attorneys  
13 now here and Mr. Davis here, it may be a good time to  
14 discuss the Court actually putting an order on granting  
15 this new sentencing hearing. The State of Ohio --

01:58 PM

16 THE COURT: Do you think we have to set a date in  
17 order to grant the hearing?

18 MR. OSTER: I don't believe a date would have to  
19 be set. I just believe an order and defense counsel  
20 may want to weigh in on this as well, but an order  
21 stating obviously the case law that has led us here,  
22 the procedural posture of this case and that the  
23 federal courts have made that order that this Court is  
24 aware of that, and pursuant to those is granting the  
25 new sentencing hearing which is exactly what the

01:59 PM

JILL M. CUTTER, RPR  
(513) 785-6596

1 original order on July 19th from Judge Graham stated  
2 this Court was required to do to satisfy the writ. And  
3 the reason obviously the State of Ohio brings this up  
4 is the writ is what we are truly here on. The writ  
5 states we need to have that granted and while the time  
6 waiver will help aid in this case, the State would feel  
7 that both that order granting that new sentencing  
8 hearing coupled with a time waiver would be what would  
9 allow this Court to proceed without any time  
10 limitations at that point because it would satisfy the  
11 writ and then have a time waiver. The time waiver  
12 itself would not satisfy the State to the feeling that  
13 there could be no possible other issues. The State  
14 would still feel that it would need that order granting  
15 the new sentencing hearing coupled with the time waiver  
16 in this case.

01:59PM

17 THE COURT: All right. Although the time waiver  
18 specifically addresses Judge Graham's order, however, I  
19 see no harm in preparing an entry indicating that, you  
20 know, we certainly intend to follow the directive of  
21 the Federal Court and grant the resentencing hearing  
22 that has been ordered in this case.

02:00PM

23 So defense counsel, do you have -- do you wish to  
24 be heard regarding the form of the resentencing entry  
25 or the necessity of it?

JILL M. CUTTER, RPR  
(513) 785-6596



1 MS. COOK-REICH: If I may have a second, Your  
2 Honor.

3 THE COURT: All right. Counsel, do you want to go  
4 ahead and take a look at the time waiver form as  
5 amended?

6 MR. OSTER: Can I approach, Your Honor?

7 THE COURT: Please.

8 MR. OSTER: Thank you.

9 THE COURT: And once you have looked at it, why  
10 don't you go ahead and give it to them.

02:01PM

11 MS. COOK-REICH: Your Honor, we would be fine with  
12 just adding it to the time waiver as a sentence that  
13 the parties agree because both counsels are signing it  
14 and the defendant is signing it. That the parties and  
15 defendant agree that this qualifies for the resetting  
16 of the resentencing hearing per the Court order and it  
17 could be placed at the bottom of the paragraph that  
18 actually references the District Court order.

19 THE COURT: I understand. I think that perhaps  
20 the formality and I think it is merely that, quite  
21 frankly, the formality of the Court formally putting on  
22 an entry indicating that we have accepted jurisdiction  
23 over the matter again and have granted a resentencing  
24 hearing. It can be very brief. I don't know that it  
25 needs to say a whole lot more than that. But simply,

02:02PM

JILL M. CUTTER, RPR  
(513) 785-6596



1 an entry formalizing the fact that the case has once  
2 again been accepted into the Common Pleas Court for the  
3 purpose of conducting a resentencing hearing as ordered  
4 by the 6th Circuit.

5 MR. OSTER: Your Honor, if I may, the one thing I  
6 would say to that is if you look at the direct language  
7 it says it is conditioned upon the State of Ohio within  
8 180 days, not necessarily the defense signing anything  
9 or anything else. It's conditioned upon the State of  
10 Ohio. There needs to be an action by the State or the  
11 Court doing that so the State would assert that we  
12 wouldn't feel comfortable just tacking that onto the  
13 time waiver. It may be I am anticipating too much or  
14 trying to go a step farther. The State is not asking  
15 for this and in way to necessary curtail any further  
16 motion the defense may have or anything else. The  
17 State of Ohio in getting this order is strictly  
18 concerned with meeting the 180-day requirement and  
19 meeting this writ and not having any problems with  
20 that. We are not trying to do anything sly with this  
21 order or anything else. We are just trying to get our  
22 time satisfied.

23 THE COURT: We wouldn't accuse you of being sly.

24 MR. OSTER: I appreciate that, Your Honor.

25 THE COURT: All right.

JILL M. CUTTER, RPR  
(513) 785-6596

1 MS. COOK-REICH: Certainly understand his  
2 position, Your Honor, if that is an entry you would  
3 like to place on.

4 THE COURT: Any objection to the State preparing a  
5 proposed entry, circulating to you for, you know, your  
6 review prior to signing to be signed if you approve it  
7 as to form?

8 MS. COOK-REICH: No problem, Your Honor.

9 THE COURT: All right. All right. And then we  
10 do have the corrected version of time waiver Mr. Oster  
11 if you want to take a look at that and let them do  
12 their thing with that.

02:04PM

13 MR. OSTER: Yes, Your Honor. Thank you.

14 THE COURT: Mr. Davis, I now have in my hands a  
15 two-page form captioned time waiver up here. On the  
16 second page it appears to have your signature right  
17 here. Is that, in fact, your signature, sir?

18 THE DEFENDANT: That is correct.

19 THE COURT: All right. And prior to signing this  
20 form, did you read the entire form?

02:06PM

21 THE DEFENDANT: Yes, I did.

22 THE COURT: And did you understand all of the  
23 information that was contained in this form?

24 THE DEFENDANT: Yes, I do.

25 THE COURT: All right. And you understand that by

JILL M. CUTTER, RPR  
(513) 785-6596

1 signing this, you are waiving your right to have us  
2 strictly comply with the time requirements set out by  
3 the Federal District Court judge as well as any other  
4 time requirements that may be construed to apply to  
5 this hearing?

6 THE DEFENDANT: I understand.

7 THE COURT: All right. And you want me to accept  
8 this as evidence of your intent to knowingly,  
9 intelligently, and voluntarily waive your right to the  
10 time limitations established in this case?

02:06PM

11 THE DEFENDANT: Yes, I do.

12 THE COURT: All right. I will go ahead and sign  
13 this time waiver indicating that the Court finds that  
14 it has been knowingly, intelligently, and voluntarily  
15 signed by the defendant. And the Court finds that the  
16 defendant has hereby waived the time requirements that  
17 would apply to this hearing. All right. Thank you.

18 MS. COOK-REICH: Thank you, Your Honor.

19 THE COURT: And we will need to make sure that  
20 this gets filed. All right. Having addressed that,  
21 we have also addressed the issue of the entry formally  
22 accepting jurisdiction of the case and granting the  
23 resentencing hearing. In an abundance of caution, does  
24 counsel need to discuss amongst themselves and with Mr.  
25 Davis, any issues involving Ms. Cook-Reich's status as

02:07PM

JILL M. CUTTER, RPR  
(513) 785-6596



1 partner with Mr. Pagan?

2 MR. PORTER: I think I did briefly yesterday. If  
3 I could beg the Court 30 seconds to talk about that one  
4 more time.

5 THE COURT: You can have more time than that if  
6 you need. We will just take another brief break to  
7 allow them to discuss that.

8 (Off-the-record discussion between defense  
9 counsel.)

10 MR. PORTER: Your Honor, we have reviewed the  
11 matter with him again, and he is comfortable with the  
12 current status of counsel.

02:09PM

13 THE COURT: Okay. All right. We will continue  
14 with that then. I just wanted to give you the  
15 opportunity to raise that here on the record if there  
16 was going to be any such issue. All right. Assuming  
17 that we have an entry signed that you had previously  
18 referenced, now, as far as scheduling future matters in  
19 this case, is there any reason why we would not be able  
20 to set a date by which counsel would be able to file  
21 any motions that they anticipate in this case and then  
22 a response date? Any reason why we wouldn't be able to  
23 set a deadline by which to file? We are not pushing  
24 time issues now, so we can set that I think at a  
25 comfortable pace for counsel given their workload and

02:09PM

JILL M. CUTTER, RPR  
(513) 785-6596



1 given the need to thoroughly prepare. Is there any  
2 reason why we can't do that?

3 MS. COOK-REICH: There is no reason if you would  
4 give us sufficient time to read the record. We would  
5 prefer just to set a different pretrial date so that we  
6 can at least have the opportunity to begin doing that.  
7 But if the Court would like to set that pretrial  
8 deadline date, if you would give us -- I don't have a  
9 number in my head. I don't know if Mr. Porter does --  
10 sufficient time to read the record and become familiar  
11 with the case.

02:10PM

12 THE COURT: Sure Mr. Oster, do you have a  
13 preference one way or the other once the time issues  
14 are resolved?

15 MR. OSTER: Once the order is signed and granted  
16 and we have the time waiver now I don't actually an  
17 opinion as to whether I would have another pretrial or  
18 have motions be met. Either way is fine.

19 THE COURT: I will indicate also, counsel, that  
20 through some diligent efforts of my bailiff, we were  
21 able to locate a file from the Clerk of Court's office.  
22 There are two boxes in my chambers in the corner that  
23 counsel would certainly have access to. Those are  
24 public records obviously. It's the file from the Clerk  
25 of Court's office and I had it brought down for

02:11PM

JILL M. CUTTER, RPR  
(513) 785-6596

1 purposes of this hearing. But certainly, you would  
2 have access to be able to review any and all documents  
3 that are contained in there, as well as any other  
4 transcripts or other matters that are pertinent to the  
5 record that you need to review.

6 MR. OSTER: Thank you, Your Honor.

7 MS. COOK-REICH: We are expecting to receive the  
8 volumes from the Chicago attorney who handled that.  
9 So we may not need that, but I would ask the question:  
10 Are you intending to send the file back up to the  
11 Clerk's office that they would then send over to the  
12 archives and who knows where they put it?

02:12 PM

13 THE COURT: It is my intent as long as we are  
14 dealing with this matter to retain those boxes in that  
15 corner of my chambers and to have any newly filed  
16 matters perhaps be kept separately by the clerk's  
17 office ultimately to be married up once this matter is  
18 concluded.

19 I think the fact that we are putting this entry on  
20 kind of regrating the sentencing hearing may put the  
21 case back on an active status with the clerk's office  
22 anyway so that they would not archive it. That may be  
23 additional benefit to the entry that you were  
24 discussing.

02:12 PM

25 MR. PORTER: There isn't a lot of track records

JILL M. CUTTER, RPR  
(513) 785-6596

1 for the state of Ohio of cases being sent back from the  
2 6th Circuit especially going to three-judge panels, so  
3 there will be a lot of issues coming up that may appear  
4 minor to the Court, but could be significant to the  
5 parties.

6 THE COURT: And my view is if they are significant  
7 to the parties they are significant to the Court.

8 MR. PORTER: The concern that at Lee I will say  
9 that I have, is since you will be involved in the trial  
10 resentencing however phrase we want to use at this  
11 time, that it would probably be the best practice that  
12 the Court not read transcript from the first trial,  
13 since that will put evidence before the Court that I  
14 don't think should be before the Court. That trial has  
15 been reversed, at least the sentencing has been  
16 reversed.

02:14 PM

17 THE COURT: Any reason why the Court would not be  
18 able to review matters that occurred during the trial  
19 phase?

20 MR. PORTER: It became -- I have been in involved  
21 in just one of these and I think there are only three  
22 or four that have gone back. I was involved in one in  
23 Hamilton County and it settled, but one of the issues  
24 that was left open and didn't get resolved before the  
25 settlement, is what access to the facts that the trier

02:14 PM

JILL M. CUTTER, RPR  
(513) 785-6596



1 of fact should or should not have. And I would have  
2 some deep concern about the Court accessing a  
3 transcript that may or may not be introduced into  
4 evidence. It's currently an open question I believe  
5 under Ohio jurisprudence of what the prosecutor gets to  
6 put it in or doesn't get to put in with respect to a  
7 resentencing. I certainly don't mean my remarks as any  
8 disrespect to the Court. I just think that it could  
9 cause a large issue later on especially if the  
10 prosecutor is permitted to introduce some facts and I  
11 don't know in what form and the Court has, in fact,  
12 read what went on previously.

02:15PM

13 THE COURT: All right. Well, in that regard, let  
14 me just indicate for the record that I have yet to take  
15 the lids off of either of those boxes, so I don't know  
16 if there are transcripts in there or not, or if it is  
17 simply the types of, you know, pleadings that normally  
18 end up in the clerk's file discovery, subpoenas being  
19 issued, returns, those kind of things. I don't know  
20 what is in there. And since counsel believes that  
21 there may be some issue, I will keep it that way until  
22 we have resolved that issue.

02:16PM

23 MS. COOK-REICH: And again we are in an awkward  
24 position in that we just get on the case ourselves, so  
25 I can't -- neither of us are in a position to tell you

JILL M. CUTTER, RPR  
(513) 785-6596



1        what is in the transcript. And for either of us to  
2        consent at this time would be very bad form  
3        professionally.

4                THE COURT: I would rather error on the side of  
5        caution, honor your concern until we are able to  
6        determine whether or not it's present here. So I have  
7        no problem with that. I don't think the State has any  
8        problem with that.

9                MR. OSTER: No, Your Honor.

10               THE COURT: You can have access to those boxes to  
11        review them, but for the time being I will refrain from  
12        doing so. All right.

02:16PM

13               So it sounds to me like the preference of the  
14        defense is to set one additional pretrial hearing so  
15        that you can get up to speed on the case to catch up,  
16        so to speak, on what has transpired in this case over  
17        the past 24 or so years. So why don't we go ahead and  
18        set one additional pretrial hearing with the idea being  
19        that in the interim period, I will sign an entry that  
20        is proposed along the lines of what the State said.  
21        Obviously I could do that today if you prepare it  
22        today.

02:17PM

23               MR. OSTER: To that regard, Your Honor, maybe I  
24        should wait until defense counsel is finished  
25        conferring, but I want to just make the record clear

JILL M. CUTTER, RPR  
(513) 785-6596

1 and I believe I heard it correctly, but wanted to make  
2 sure I understood and don't leave here without making  
3 sure this was. I thought I heard the defense say that  
4 the prosecution obviously preparing that order, having  
5 it come down to, Your Honor and Your Honor signing that  
6 order granting it, they have no objection to that.

7 THE COURT: That is correct. I did indicate that  
8 they would have an opportunity to review it and approve  
9 it as to form.

10 MS. COOK-REICH: That's correct.

02:18PM

11 MR. OSTER: I wanted to make sure that -- coming  
12 from the prosecutor's office down to Your Honor, Your  
13 Honor granting it, was not objected to.

14 MS. COOK-REICH: You are going to send it to us  
15 first?

16 MR. OSTER: I will send it to you. But just that  
17 the procedure itself, that there --

18 THE COURT: And the reason for that, I am  
19 indicating on the record that I intend to grant the  
20 rehearing and to accept jurisdiction over the case. I  
21 don't feel that I have a choice in the matter anyway.  
22 It's simply going to be a matter of the wording, and so  
23 as long as the defense has had the opportunity to  
24 review it, I don't see any harm in having the State  
25 take the first shot at drafting that wording.

02:18PM

JILL M. CUTTER, RPR  
(513) 785-6596

1 MR. OSTER: And again, I apologize and Your Honor  
2 will probably get a little sick of this assistant  
3 prosecutor, but coming from the appellate division, a  
4 lot of times I just want to make sure the record is  
5 clear since I harp on other people, I would hate to be  
6 guilty of it myself.

7 THE COURT: If I get sick of you, it probably has  
8 nothing to do with the appellate division. Just  
9 kidding.

10 I am trying to figure out, when -- give me a rough  
11 idea of what counsel would like to come back and feel  
12 that -- because what I would like to do at the next  
13 hearing is then take a substantial step towards setting  
14 a full scheduling order in the case to include the  
15 ultimate hearing date, to include a briefing schedule  
16 for motions, to include a date for oral argument or the  
17 presentation of evidence on any of those motions, all  
18 of those matters that we would normally take up. And  
19 so how much time do you think it would take counsel to  
20 be able to familiarize yourself with the history of the  
21 case sufficiently to set those dates?

22 MS. COOK-REICH: If we could set it for the last  
23 week of January, Your Honor.

24 THE COURT: Any objection to that, Mr. Oster?

25 MR. OSTER: The only thing I may add to that, Your

JILL M. CUTTER, RPR  
(513) 785-6596



1 Honor, if it is going to be the last week in January,  
2 we may well just ask for it to be that first week in  
3 February. I believe I maybe having co-counsel join me  
4 and that co-counsel may be around come February 4th,  
5 the week of, which is that first week in February.  
6 But if we need to do in January, as we are just setting  
7 times, I don't think that is a problem here either.  
8 Just wanted to state that on the record for all  
9 parties.

10 MS. COOK-REICH: We are fine with the next week in  
11 February, Your Honor. The only date that I cannot do  
12 it would be Tuesday, the 5th.

13 THE COURT: All right.

14 MR. OSTER: I will say that the 4th and the 6th  
15 then would be our preference, Your Honor.

16 THE COURT: All right. I currently have a civil  
17 bench trial scheduled for the 4th and being a bench  
18 trial I could take a break from that really at any  
19 point in time. So what time during the day would be  
20 most convenient to counsel? I know you will be  
21 traveling down from Columbus, Mr. Porter, so I imagine  
22 the afternoon on Monday 4th.

23 MS. COOK-REICH: Yes, please.

24 THE COURT: Do we want to go ahead and set that  
25 for maybe the 2:00 range. I may even have the bench

JILL M. CUTTER, RPR  
(513) 785-6596

1 trial concluded by that time.

2 MR. OSTER: That's fine with the State, Your  
3 Honor.

4 THE COURT: This matter is set for hearing at  
5 2:00 PM, February 4th, 2008. I will indicate that the  
6 defendant waived all time requirements in the case on  
7 the record and in writing. The Court to sign an entry  
8 re-assuming jurisdiction and granting a resentencing  
9 hearing. That is just summarizing the matters that we  
10 took up at this hearing. If counsel would approach and  
11 sign the pretrial order.

02:24PM

12 MR. PORTER: We have another issue we would like  
13 to address, And this may fit in the category of  
14 housekeeping, but certainly should not be delegated to  
15 what we normally refer to as housekeeping.

16 I was advised by Mr. Davis yesterday when we met  
17 prior to the hearing that he had been left in a cold  
18 room for approximately four hours, in a room without  
19 heat. I then I met with him afterwards yesterday and  
20 was informed that the local jail removed all his OSP  
21 clothing when he arrived. They gave him an orange  
22 jumpsuit. They didn't give him socks. It's my  
23 understanding and I will take his word for it that he  
24 doesn't have anything on underneath the orange  
25 jumpsuit. He has not been given any soap. He has not

02:25PM

JILL M. CUTTER, RPR  
(513) 785-6596

1        been given any other toiletries. To be honest with you  
2        and I apologize to Mr. Davis, to miss this significance  
3        of this until I was outside this morning bright and  
4        early and had a heavy leather jacket on and thought of  
5        Mr. Davis who is there in a skimpy, short sleeve  
6        jumpsuit with nothing on underneath it.

7                THE COURT: And he gets the benefit of being able  
8        to come in through sally ports where he is not exposed  
9        to elements, but that being said --

10              MR. PORTER: It is certainly still unacceptable  
11        that he -- the sock that he has on today are borrowed.  
12        He doesn't have any toilet items. He is unable to  
13        shower and that is certainly at least from my limited  
14        perspective, unacceptable. I have never gone about  
15        that -- ran into this problem in another county. And I  
16        am unclear about how to go to solve the problem. It  
17        doesn't, to be honest with you, appear to be defense  
18        counsel's problem. If the jail is housing him, they  
19        ought to at least give him sufficient items and  
20        sufficient clothing, and would like the matter  
21        corrected in the future so he doesn't sit cold, so he  
22        has socks of his own, and so he is able to bathe on his  
23        own. And I truly do not believe that is too much to  
24        ask.

25              THE COURT: All right. Well, okay. Thank you

JILL M. CUTTER, RPR  
(513) 785-6596



1       for raising the issue. I obviously have no  
2       independent information as to what the practice is over  
3       there with regard to Mr. Davis or what reasons there  
4       maybe for how they are handling Mr. Davis, but if you  
5       believe it is an issue, I would certainly welcome you  
6       -- we can have an evidentiary hearing on that and you  
7       would be able to present evidence as to what you  
8       believe the circumstances are that are inappropriate  
9       and if the State feels that there is evidence to be put  
10      on to suggest that it is appropriate, we can deal with  
11      that issue as well.

02:27PM

12               Certainly, I would expect that Mr. Davis would be  
13      given the same courtesies and rights while housed at  
14      the Butler County Jail that any other inmate would  
15      have. And if he doesn't have that, then, you know,  
16      that is inappropriate. But I don't know if we are  
17      considered luxurious or skimpy by other counties'  
18      standards. I am not --

19               MR. PORTER: I just don't know how denying someone  
20      soap -- it is one of the most basic things of life.

02:28PM

21               THE COURT: I don't know what the circumstances  
22      are. And other than you saying it here, I don't have  
23      any evidence before me as to what is transpiring or is  
24      not transpiring. If you think that it rises to the  
25      level of an issue that you really need to bring before

JILL M. CUTTER, RPR  
(513) 785-6596

1 me, then, you know, you are welcome, like I said, to  
2 set that matter for hearing. We can have an  
3 evidentiary hearing and determine what the appropriate  
4 course of action should be.

5 In the meantime, of course, I will take it upon  
6 myself to reiterate to the transport officers that, of  
7 course, I would expect that he would enjoy this same  
8 rights and privileges that any other person of his  
9 status would have at the jail. There may be some  
10 differences between people that are pretrial, people  
11 that are there that have been transported from other  
12 facilities, people, you know, in different security  
13 levels that may apply. I'm not sure. But whatever a  
14 person, another person, or any other person of his  
15 status would be able to enjoy, he should be able to  
16 enjoy as well.

02:28PM

17 MR. PORTER: I have learned from Mr. Oster so the  
18 appellate record is clear on this, Mr. Davis today is  
19 dressed in a jumpsuit, which has for lack of a better  
20 term a plunging neck line. He has what I would refer  
21 to as flip-flops. He has on a pair of white socks,  
22 which I understand was -- he borrowed from another  
23 inmate and hopefully I am not jeopardizing Mr. Davis or  
24 the other inmate when I shared the information that he  
25 borrowed the socks. And I believe I mentioned it was a

02:29PM

JILL M. CUTTER, RPR  
(513) 785-6596

1 short sleeve shirt. If the conditions continue, then  
2 we will accept the Court's offer and we will go ahead  
3 with that evidentiary hearing on the matter.

4 I would also indicate for the appellate record  
5 that the escorting deputy while the Court made its  
6 recent statement about whether he was being treated any  
7 differently or not, was shaking his head, no. So I am  
8 only to assume at least from the shake of the head is  
9 that this is standard procedure in the Butler County  
10 Jail that we, in fact, deny people the basics.

02:30PM

11 MR. OSTER: Your Honor, I would object to that  
12 statement. That is not evidence here. That is an  
13 observation. We don't know why he is doing that.  
14 Furthermore, the State is not aware of any of this. We  
15 were never contacted that there was any problem. I  
16 never heard that there was a request made by Mr. Porter  
17 to any of the deputies asking for that or anything  
18 else. While I don't want this situation to go if it is  
19 a problem and I would agree that if there is a problem,  
20 we would want it addressed. We would simply ask to be  
21 asked. If there is a situation like that, we will try  
22 correct what we can. But as to the deputy and what  
23 they may or may not have done, we would ask that -- we  
24 would object to that and ask for that to be stricken.

02:30PM

25 THE COURT: Well, it's certainly speculative on

JILL M. CUTTER, RPR  
(513) 785-6596



1 your part to interpret from 40 feet away what any  
2 gestures, that I obviously am not privy to because I am  
3 looking at you, what gestures the transport officer may  
4 or may not have made. So -- and as far as then  
5 assuming what that means, it's purely speculative, Mr.  
6 Porter. And so as long as the record reflect that as  
7 well, then I think I am satisfied in that regard.

8 I will also indicate that the clothing that Mr.  
9 Davis is wearing, is garb that this Court sees in about  
10 every case. So I think that -- I don't think it's  
11 inappropriate to indicate that that is the standard  
12 jail garb that I see 20 or 30 times a week probably on  
13 prisoners in the Butler County Jail.

02:31PM

14 MS. COOK-REICH: Your Honor, if I could speak to  
15 that. As Mr. Porter is not from this county that I  
16 have practiced in for 11 years, I advised Mr. Porter  
17 that it was my opinion and my experience and at least  
18 in the last couple of years that it is common practice  
19 of the Butler County Sheriff's Department to not  
20 provide the shampoo and the toothpaste; that they  
21 provide it a commissary. As well as the socks,  
22 underwear and undergarment shirt. I believe what Mr.  
23 Porter is speaking of is that he came from his facility  
24 here with some of those things and they would not allow  
25 him to have those. And we are talking about warmth and

02:32PM

JILL M. CUTTER, RPR  
(513) 785-6596

1 things of that nature, as well as cleanliness. I  
2 advised that maybe one possible solution, because he is  
3 being transported down here and he may not be able to  
4 -- has not been allowed to have those things, is that  
5 the next time that he knows that he is going to be down  
6 here, I could certainly go and purchase those items and  
7 drop them off at the jail and then bill those out to  
8 the county expense at the end of the matter. That is  
9 my personal experience. I didn't see the deputy nod or  
10 not, but I know from my experience, that other clients  
11 have told me those things.

02:32PM

12 THE COURT: All right. Well, we certainly, as I  
13 indicated, would want Mr. Davis to have the same rights  
14 and enjoy the same privileges that any other person of  
15 his status would have. If there have been any  
16 different treatment, I would certainly hope that is  
17 based on some contingency, such as the fact that he was  
18 transported from another facility, and they have  
19 certain security issues or other issues or rules that  
20 apply. I think that in the short-term it would will  
21 be remedied by the fact that he will be transported  
22 back to the institution until we are ready for the  
23 other hearing. And if, counsel, there is more to be  
24 presented on this issue, like I said, feel free to, if  
25 you do not believe that you can remedy it by virtue of

02:33PM

JILL M. CUTTER, RPR  
(513) 785-6596

1 making a request or handling it the way Ms. Cook-Reich  
2 indicated, file a motion and we will hear it.

3 MR. OSTER: Your Honor, one other thing I would  
4 add to that, is the reason that Mr. Davis was here at  
5 that time is the transport order that we put on tried  
6 to get him here early. The hearing before that we had,  
7 I will try to make sure I make this right for the  
8 record, I believe the November 5th hearing we had, we  
9 wanted to make sure that Mr. Davis could come over in  
10 time so that Mr. Porter could consult with him. So it  
11 was our office that asked for him to be here at 8:30 so  
12 that he was here and more than available to be  
13 consulted with.

02:34PM

14 Obviously, if that is ever going to be a problem  
15 we can try to take care of that from our end as well.  
16 If the State aided in that part of it, we will be more  
17 than happy to fix that, but I would just like to say  
18 that was why the transport order was like that. My  
19 understanding from that hearing was that they would  
20 have liked him here early to discuss things with him.  
21 And if that is too early, again, we are more than happy  
22 to have people speak to us, and try to take care of  
23 that situation if we can.

02:34PM

24 THE COURT: All right. Anything more?

25 MR. PORTER: I have nothing, Your Honor.

JILL M. CUTTER, RPR  
(513) 785-6596



1 MS. COOK-REICH: No, Your Honor.

2 THE COURT: I think that the record is sufficient  
3 in that regard. If counsel would approach, then, and  
4 sign the pretrial order, please.

5 Counsel, then is there anything further that we  
6 need to take up today on the record? Otherwise we will  
7 be adjourned on this matter until February 4th at  
8 2:00 PM. The defendant to be transported back to the  
9 State facility between now and the next hearing. We  
10 will make sure that we have him transported back for  
11 that next hearing. And in the interim period, I will  
12 be ultimately signing an entry that has been reviewed  
13 by both counsel regarding the granting of the  
14 rehearing. Anything further?

02:35 PM

15 MS. COOK-REICH: One thing, Your Honor. Is it  
16 possible to have an order to have Mr. Davis remain here  
17 at least until Friday morning so that I might have an  
18 opportunity to see him while he is still in the county.  
19 I had something cleared from my schedule and I could go  
20 over and see him on Thursday.

02:36 PM

21 THE COURT: I'm just now concerned about the other  
22 issues that have been raised. And, you know, I don't  
23 want to be put between a rock and a hard place that by  
24 granting your request, I am in some way not adequately  
25 addressing his other needs.

JILL M. CUTTER, RPR  
(513) 785-6596

1 MS. COOK-REICH: I discussed that with Mr. Davis  
2 and he would like an opportunity to stay and he will --

3 THE COURT: Obviously, if the Court needs -- or if  
4 Court's intervention is needed in some manner, get  
5 ahold of the prosecutor, get ahold of me and we will  
6 handle it by way of hearing.

7 MS. COOK-REICH: Thank you, Your Honor.

8 THE COURT: The defendant will stay here until  
9 Friday.

10 MR. OSTER: Just two very small things. First  
11 one, just note for the record at certain times defense  
12 counsel turned off their microphone so that their  
13 microphone probably wasn't working right. The court  
14 reporter's transcript will probably be the easiest  
15 thing for purposes of the record in this case. Just  
16 so that is noted in case it ever becomes an issue. I  
17 don't anticipate it.

02:37PM

18 The second thing would be I know that we have  
19 decided pursuant to what the defense felt as far as not  
20 pulling random draw or something else as to the three  
21 judges, the State did a little bit of research on that;  
22 didn't know if the Court wanted to hold off on that, or  
23 would like the case cites to look at. Any way the  
24 Court would like to handle that.

02:37PM

25 THE COURT: We will wait until the issue is before

JILL M. CUTTER, RPR  
(513) 785-6596

1 the Court by way of motion.

2 MR. OSTER: That's fine, Your Honor.

3 MS. COOK-REICH: Thank you.

4 THE COURT: Anything further --

5 MS. COOK-REICH: No, Your Honor.

6 THE COURT: -- I hesitate to say. All right.

7 MR. OSTER: Nothing on the State's part.

8 THE COURT: We will be adjourned on this matter.

9 We can go off record.

10 (Hearing concluded at this time 2:38 p.m.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

JILL M. CUTTER, RPR  
(513) 785-6596



1 STATE OF OHIO )

2 ) SS. REPORTER'S CERTIFICATE

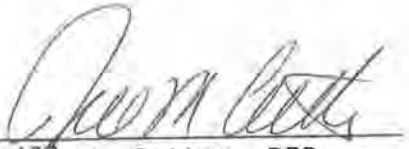
3 COUNTY OF BUTLER )

4 I Jill M. Cutter, RPR, do hereby certify that I am  
5 a Registered Professional Reporter and Notary Public within  
6 the State of Ohio.

7 I further certify that these proceedings were  
8 taken in shorthand by me and by electronic means at the time  
9 and place herein set forth and was thereafter reduced to  
10 typewritten form, and that the foregoing constitutes a true  
11 and accurate transcript, all done to the best of my skill and  
12 ability.

13 I further certify that I am not related to any of  
14 the parties hereto, nor am I in any way interested in the  
15 result of the action hereof.

16 Dated at Hamilton, Ohio, this 24th day of  
17 December, 2009.

18   
19 Jill M. Cutter, RPR  
20 Official Court Reporter  
21 Butler County Common Pleas  
22 Hamilton, Ohio 45011  
23  
24  
25

JILL M. CUTTER, RPR  
(513) 785-6596

COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO

2017 JAN -8 PM 2:41

C. J. CARPENTER  
BUTLER CO., OHIO  
CLERK OF COURTS

STATE OF OHIO,

Plaintiff,

Case No. CR-1983-12-0614

CA 09-10-263

vs.

FILED BUTLER CO.  
COURT OF APPEALS

HONORABLE ANDREW NASTOFF

VON CLARK DAVIS,

JAN 08 2010

**ORIGINAL IMAGED**

Defendant.

CINDY CARPENTER  
CLERK OF COURTS

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

MARCH 6, 2008

JILL M. CUTTER, RPR  
(513) 785-6596

1 APPEARANCES:

2

3 on behalf of the plaintiff:

4 MICHAEL A. OSTER, JR., ESQ.  
5 DAN EICHEL, ESQ.  
6 Assistant Butler County Prosecuting Attorney  
7 11th Floor  
8 315 High Street  
9 Hamilton, Ohio 45011

10 on behalf of the defendant:

11 MELYNDA COOK-REICH, ESQ.  
12 Repper, Pagan, Cook  
13 1501 First Avenue  
14 Middletown, Ohio 45044  
15 and  
16 RANDALL PORTER, ESQ.  
17 Assistant State Public Defender  
18 250 East Broad Street  
19 Suite 1400  
20 Columbus, Ohio 43215  
21  
22  
23  
24  
25

JILL M. CUTTER, RPR  
(513) 785-6596



## 1 Transcript of Proceedings

## 2 Afternoon Session

3 - - - - -

4 THE COURT: We're on record in State of Ohio vs.  
5 Von Clark Davis. This is CR83-12-0614. For the  
6 record, Von Clark Davis appears personally with counsel  
7 Mr. Porter and Ms. Cook-Reich. For the State, they are  
8 represented by their assistant county prosecutors  
9 Michael Oster and Dan Eichel. Good afternoon, counsel.

10 Refresh my recollection. On our overall pretrial  
11 schedule in this case, I know we are here today for the  
12 limited purpose of addressing some additional or some  
13 issues regarding appropriation of funds. We wanted to  
14 handle those separately and early enough so that the  
15 experts, assuming that funds are provided -- can get to  
16 work and allow us to be able to accomplish things along  
17 the time line we originally set.

03:00PM

18 Was there anything further that we were going to  
19 take up today above and beyond that according to the  
20 schedule?

03:01PM

21 MS. COOK-REICH: I had a notation that we were  
22 going to do the three-judge pull today.

23 MR. OSTER: As did I as well, Your Honor.

24 THE COURT: I believe that I have a bucket  
25 available. Let me make sure that we have all of the

JILL M. CUTTER, RPR  
(513) 785-6596

1 names in there. We can take that up as well. All  
2 right.

3 Correct me if I am wrong, but is there an  
4 agreement that Judge Sage would be not appropriate to  
5 be in the pull since he was a prosecutor in the  
6 original action?

7 MS. COOK-REICH: If there were no agreement, we  
8 would certainly file a written motion to that effect.  
9 He should be recused.

10 THE COURT: Do you wish to argue that?

03:01PM

11 MR. EICHEL: We agree with that, Your Honor.

12 THE COURT: All right. Any other judges that you  
13 can think of? I have Judge Spaeth, Oney, Hedric,  
14 Powers, Pater, anyone in that group that you know of  
15 that has any conflict or any reason why they would not  
16 be able to preside, if indeed it is a three-judge panel  
17 that hears the case?

18 MS. COOK-REICH: Your Honor, as you are aware,  
19 Judge Powers is my former law partner. I haven't had  
20 any cases with him in this calendar year. I don't know  
21 whether he is still recusing himself from our cases.

03:02PM

22 THE COURT: I think the law contemplates about a  
23 one-year period after a person -- that is what I was  
24 informed is that it contemplates not hearing cases with  
25 former law partners or affiliates for a period of one

JILL M. CUTTER, RPR  
(513) 785-6596

1 year. We are beyond that time period.

2 MS. COOK-REICH: We are beyond that, Your Honor,

3 THE COURT: Are you raising an issue in that  
4 regard?

5 MR. EICHEL: No, Your Honor.

6 THE COURT: All right. Well, we can take that up  
7 in a moment. First, I know that we have a motion to be  
8 heard ex-parte. And, counsel, what I would ask  
9 initially, although there have been occasions where I  
10 have granted ex-parte hearing in these -- in capital  
11 litigation. I haven't found that it is always  
12 necessary to do so. I believe the law contemplates a  
13 situation where the defense should not be place in a  
14 position where essentially they would have to reveal  
15 trial strategy issues, things like that, that they  
16 wouldn't have otherwise been forced to reveal had they  
17 been able to retain the expert privately. And so,  
18 obviously I wouldn't want to get into a situation where  
19 we would be discussing that, but I am noting for the  
20 record that there is not going to be a trial on the  
21 matter, the underlying -- there has already been a  
22 conviction and a finding of guilt and we are at a  
23 mitigation phase, so that may factor in or may at least  
24 lessen some of the concerns with regard to trial  
25 strategy since we are really talking about mitigation

03:03PM

03:04PM

JILL M. CUTTER, RPR  
(513) 785-6596



1 strategy. But with that being said, I mean, are you  
2 arguing that we have to go into an ex-parte hearing  
3 immediately, or generally I am inclined to grant these  
4 motions early on based on, you know, just showing --  
5 making a prima facia showing of the Mason standards in  
6 Ohio, and the Ake standards and then if there is a  
7 requirement to come back for additional funds and you  
8 require an ex-parte hearing, I would consider that  
9 separately. I guess I am trying to figure out where  
10 you are at on this counsel.

03:05PM

11 MS. COOK-REICH: Your Honor, we would request a  
12 full ex-parte hearing on all of the funds that we are  
13 requesting. We believe that although the word trial  
14 strategy is used, that also is applicable to the  
15 mitigation trial strategy. We believe it is our  
16 client's right not to have that available to the  
17 prosecutor prior to the time in which we are deciding  
18 to go use an expert.

19 THE COURT: Well, the problem is, I can't even  
20 tell from the motion what experts you are requesting.  
21 Like what areas you are requesting. I mean, I have to  
22 be able to at least make a preliminary determination.

03:05PM

23 MS. COOK-REICH: In general, we are requesting  
24 funds for obviously a mitigation specialist, an  
25 investigator, and mental health experts. In regards to

JILL M. CUTTER, RPR  
(513) 785-6596

1 the specific mental health experts, we would like an  
2 ex-parte on that and I can tell you that we are  
3 interviewing and determining which ones we may proceed  
4 forward on.

5 THE COURT: All right. State wish to be heard?

6 MR. OSTER: Your Honor, obviously the State filed  
7 a motion, which hopefully this Court has at least been  
8 able to get --

9 THE COURT: Yes.

10 MR. OSTER: The State obviously addressed the fact  
11 that multiple states have ruled that there is no  
12 constitutional right for this, and we have cited  
13 numerous cases for that proposition. Secondly, it  
14 seemed the State to be a twofold argument that the  
15 defense put forward, the first issue being that right  
16 of self incrimination, which in this case, there is  
17 already been a guilty finding, which has been affirmed  
18 by multiple courts. So the state is having trouble  
19 seeing where a self incrimination could be seen by Mr.  
20 Eichel and myself sitting here today listening to which  
21 experts were needed.

22 I think the second, when it goes to the theory of  
23 the case or I think what would be put in quotation  
24 marks is you know that for layman's terms, cat out of  
25 the bag type argument, this case has already had a jury

JILL M. CUTTER, RPR  
(513) 785-6596

1 -- or a panel finding of guilt. It's had a mitigation  
2 hearing in 1983. A mitigation hearing in 1989. It has  
3 gone through the Court systems. The 6th Circuit wrote  
4 its decision saying why specifically this had to come  
5 back, which details what evidence will be allowed to be  
6 put on. Obviously, the prison records of the defendant  
7 in this case. To the State it's hard to see where the  
8 proverbial cat out of the bag is in this case, as it  
9 has already gone through that many stages.

10 It's not the case I think as we had put on the  
11 record before of a typical case. Most people in this  
12 courtroom have never seen a case quite of this  
13 procedural posture. And I don't think it is the type  
14 of case and it would be the State's position that these  
15 typical arguments hold in light all of that, that I  
16 have put on the record here today, Your Honor.

03:07PM

17 THE COURT: All right. Well, yeah, I think it is  
18 a fair statement that, you know, most of us in here  
19 haven't seen a case in this procedural posture and I  
20 don't want to see it again.

03:07PM

21 MR. PORTER: We would like an opportunity to  
22 address those arguments, Your Honor.

23 THE COURT: Sure.

24 MR. PORTER: The first is, I am currently  
25 litigating another case with Mr. Oster, so I may be

JILL M. CUTTER, RPR  
(513) 785-6596



1 reading something into his argument that at least  
2 having seen it another case from him, as I don't think  
3 there is anything in that 6th Circuit opinion that  
4 limits what evidence we could put before you with  
5 respect to the new sentencing hearing.

6 THE COURT: well, yeah. My understanding is that  
7 it is a resentencing and that it is a, you know, a de  
8 novo hearing. It is a resentencing de novo.

9 MR. PORTER: Secondly is, there has been a  
10 reference to Red, as I will call him, having forfeited  
11 his Fifth Amendment right. I am under no law that  
12 knows that he has forfeited his right to self  
13 incrimination with respect to this resentencing  
14 hearing. He certainly also has a right to his Sixth  
15 Amendment right to counsel at the new hearing, which  
16 would again protect our privileged communications with  
17 him.

03:08PM

18 With respect to the cat out of the bag argument is  
19 we plan, at least tentatively, of going in new areas  
20 with respect to the sentencing hearing that this Court  
21 holds in August. To think that we are just going to  
22 put on the same evidence that was put on at the prior  
23 hearing, would certainly mean that this Court would  
24 have to do the hearing yet again because that would  
25 amount to ineffective assistance of counsel.

03:09PM

JILL M. CUTTER, RPR  
(513) 785-6596

1           The Court -- the State has cited you to some cases  
2           and I would like to discuss those with you if I could,  
3           Your Honor.

4           THE COURT: All right.

5           MR. PORTER: And that, the prosecution is -- what  
6           I try to do is group them by jurisdiction. They cited  
7           you, Your Honor, to a number of cases. And I think we  
8           need to start with the U.S. Supreme Court case of *Ake*  
9           *vs. Oklahoma*. And I am quoting from page 82 to page  
10          83. Quote, when the defendant is able to make an  
11          ex-parte threshold showing to the trial court that his  
12          sanity is likely to be a significant factor in his  
13          defense, the need for assistance of a psychiatrist is  
14          readily available. So I would suggest to the Court  
15          strongly that the U.S. Supreme Court itself in *Ake*  
16          recognized the right to an ex-parte hearing.

03:10PM

17          THE COURT: There is a difference between  
18          recognizing a right under certain circumstances and  
19          indicating that it is constitutionally required in all  
20          circumstances. wouldn't you agree?

03:10PM

21          MR. PORTER: I understand, but again, it's *Ake's*  
22          coming out of a case coming out of Oklahoma. The only  
23          thing that the U.S. Supreme Court would be addressing  
24          in *Ake* would not be a state statutory right. It would  
25          have to be a federal constitutional right since that is

JILL M. CUTTER, RPR  
(513) 785-6596

1 the only way that the U.S. Supreme Court would have  
2 jurisdiction over this case.

3 THE COURT: I remember reading some cases,  
4 subsequent to the, you call it Ake, and I have always  
5 referred to it as Ake, I don't know which one is right.  
6 You may be right. It proposed that the reason that  
7 language is in Ake is because there is a federal  
8 statutory requirement for an ex-parte hearing that they  
9 may have been assuming would apply in state scenarios  
10 as well. I know there are other states as well as the 03:11PM  
11 federal system that have a statutory requirement. The  
12 state of Ohio, to my knowledge, does not have a  
13 statutory requirement, but recognizes that under  
14 certain circumstances, an ex-parte hearing may be  
15 appropriate. Now, that is my understanding of the law.

16 MR. PORTER: That is correct with respect to some  
17 Court's speculating that was an assumption by the U.S.  
18 Supreme Court. I think it is a dangerous assumption,  
19 again, since they are addressing a case out of  
20 Oklahoma, and why they would be assuming that federal 03:12PM  
21 statute comes into play or the two statutes are similar.  
22 Certainly, somewhat demeans the U.S. Supreme Court that  
23 they would be making assumptions such as the same.

24 I would also like to discuss some of the cases  
25 cited by the State, because I think they are helpful.

JILL M. CUTTER, RPR  
(513) 785-6596



1 And the first is, and I am going to group them together  
2 by jurisdiction, if I could, Your Honor. The first  
3 being *State vs. Fitz*, which is a North Carolina case.  
4 And the Court talks about that it may -- while they  
5 didn't find it a constitutional right, the Court found  
6 that it was a preferred procedure to go ex-parte. And  
7 then I think it is important to look at how North  
8 Carolina continues to apply Fitz. And if the Court  
9 would go onto -- and again this is a case cited by the  
10 State, *State of Ohio North Carolina vs. White*. And in  
11 White, the Court cites to *State vs. Ballard*, which we  
12 cited in our memorandum. And I am on -- when I am  
13 looking at Ballard, I am looking at page 277, Your  
14 Honor.

15 THE COURT: Okay.

16 MR. PORTER: And I meant to bring a copy with  
17 Ballard with me this morning. I did not. The North  
18 Carolina, courts have recognized that -- the way I read  
19 Ballard -- is that there is an absolute right to an  
20 ex-parte hearing when you are talking about mental  
21 health professionals. And the reason for that is as  
22 opposed to an investigator, when you are sharing work  
23 product with the Court with respect to the need for a  
24 mental health professional, you are talking about  
25 things that, in fact had gone on in the defendant's

JILL M. CUTTER, RPR  
(513) 785-6596

1 mind, the way he was processing information, and that  
2 certainly implicates his Fifth Amendment rights. And  
3 again, I would repeat for the Court, is, in fact, that  
4 we are requesting mental health assistance in this  
5 matter. And that it is our position -- I am sorry. I  
6 lost my train of thought for a minute. It is certainly  
7 our position that the Fifth Amendment will apply to the  
8 resentencing hearing.

9 And the case of *State vs. Garner*, cited by the  
10 State again, the Court in that case -- and I am on page 03:15PM  
11 695 to 696 -- again, recognizes the right to go  
12 ex-parte when dealing with a mental health  
13 professional. So to the extent that those courts, this  
14 Court finds those cases relevant, with respect to the  
15 issue of ex-parte, it speaks in the terms of we have an  
16 absolute right with respect to a mental health  
17 professional.

18 The prosecution also cited the Court to the case  
19 of *State of Tennessee vs. Smith*. And that case is  
20 certainly distinguishable, because as this Court has 03:15PM  
21 just mentioned briefly, Tennessee is one of those  
22 jurisdictions with respect to there is a right to go  
23 ex-parte.

24 The prosecution cited this Court to two Virginia  
25 cases. Excuse me, Your Honor. And it is always

JILL M. CUTTER, RPR  
(513) 785-6596

1 interesting to look at the jurisprudence of those  
2 states in which they actively execute their citizens.  
3 They cite you to *Weeks vs. Virginia*. And in *Weeks*, I  
4 agree with the prosecution's reading that they held  
5 that there was no right to go ex-parte to the Court  
6 with respect to experts. But they do it in one  
7 paragraph and site the reader back to the *Ramdass vs.*  
8 *Commonwealth*. And if you go back to read -- and the  
9 State, I believe, cites *Ramdass*, when you go back to  
10 *Ramdass*, it is pretty much of a one-paragraph issue,  
11 and what it does -- two paragraphs, excuse me, Your  
12 Honor -- and cites the Court back to the *O'Dell*  
13 decision. And when you go back to read the *O'Dell*  
14 decision, and the full cite is *O'Dell vs.*  
15 *Commonwealth*, 364 SE 2d. 491. The decision itself,  
16 which is really the original decision cited by all of  
17 the Virginia cases, has nothing to do with the ex-parte  
18 appointment of experts. There is one additional  
19 jurisdiction that the prosecutor cited this Court to,  
20 and both of them were two Arizona cases. And in those  
21 cases, there is a little discussion, and what the Court  
22 basically came down to is that the Supreme Court of  
23 Arizona found that defense counsel could not ethically  
24 meet with defense counsel for purposes of an ex-parte  
25 funding hearing. I suggest that doesn't control in

03:16PM

03:17PM

JILL M. CUTTER, RPR  
(513) 785-6596



1 this case, I am also aware and I assume that at the  
2 most recent judges' conference there was a presentation  
3 regarding an ex-parte conversation case that came out  
4 of the Ohio Supreme Court recently in the case of  
5 *State vs. Roberts*. And I am sorry I don't have a cite  
6 to it. I gather it has been the mention of some  
7 judges. I think the case is distinguishable, but I  
8 would like to talk a minute about the case.

9 In Roberts what it occurred is, that the jury had  
10 returned a death verdict and the prosecutor,  
11 prosecutors, and the trial judge, Judge Stewart decided  
12 they would get together and jointly draft the  
13 sentencing opinion. The Ohio Supreme Court opinion  
14 really doesn't do justice on what occurred in the case.  
15 Defense counsel was not aware of the ex-parte process.  
16 At sentencing the Judge, before asking defense counsel  
17 or the defendant if they had anything to say, started  
18 to read the death opinion into the record. Defense  
19 counsel noticed that every time the Judge turned his  
20 page, the prosecutor was likewise turning the page and  
21 at some point defense counsel stood up and objected.  
22 The Judge, Judge Stewart, stood up and said gosh, I'm  
23 sorry, we forgot to tell you about the drafting  
24 process. And the judge at that point said will, there  
25 is only one or two versions, the prosecutor said three

03:18PM

03:19PM

JILL M. CUTTER, RPR  
(513) 785-6596

1 or four. The Judge then went into chambers, met with  
2 defense counsel and the prosecutor and we heard there  
3 were four or five, then we heard there were six or  
4 seven. And the case got reversed. But I think the  
5 case is substantially different, because in that case,  
6 what was going on is there was drafting of a sentencing  
7 opinion, which had certainly affected the defendant, as  
8 well as the prosecution.

9 In this case, and it's been our presentation in  
10 the motion is that the funding issue that we are asking  
11 to approach, asking to approach this Court ex-parte,  
12 does not relate to the prosecution. So, in fact, the  
13 Roberts decision has no relevancy to the issue that is  
14 currently before the Court. I understand that there  
15 are disciplinary proceedings pending against the Judge  
16 and prosecutor which are going forward in evidentiary  
17 hearing in March. I don't think it has any relevancy  
18 to the issue before this Court. Thank you, Your Honor.

19 THE COURT: Thank you, Mr. Porter. Let me just  
20 ask the prosecutor, I don't need you to respond to the  
21 recitation of the case law, but what is the State's  
22 position regarding the underlying issue of the  
23 appropriateness of the Court providing funds for expert  
24 assistance in this matter?

25 MR. OSTER: I don't think the State has any

JILL M. CUTTER, RPR  
(513) 785-6596

1 objection necessarily for funds being furnished for  
2 what is necessary and that is Your Honor's decision and  
3 your discretion, and I think that, you know, in these  
4 type cases I think that, you know, typically funds will  
5 be given by the discretion of the trial court as to  
6 what is necessary. The State has no objection to the  
7 Court using its discretion.

8 THE COURT: All right. And I guess the only  
9 question I would have is typically I know the Court  
10 will entertain motions for an investigator and a 03:22PM  
11 mitigation specialist and if appropriate if there is an  
12 issue that is raised, a mental health expert. But  
13 normally the investigator, in my experience, assists in  
14 trial preparation; the mitigation specialist assists in  
15 preparation for mitigation phase materials. And then  
16 obviously the mental health expert would also apply in  
17 mitigation. I guess, whether you have a position on  
18 the appropriateness of funds for an investigator, when  
19 there is not a trial to be had versus simply -- not to  
20 diminish the importance of it, but it is the mitigation 03:22PM  
21 phase. It is one part of the trial, not the entire  
22 trial.

23 MR. EICHEL: If Your Honor, please, it's my  
24 understanding of what a mitigation specialist does, is  
25 that part of the -- that is the way it has been

JILL M. CUTTER, RPR  
(513) 785-6596



1 explained to us by defense attorneys in the past, they  
2 do the investigation for the mitigation. Whereas the  
3 Court traditionally is appointed an investigator on the  
4 facts of the case to go during for a -- the guilt phase  
5 as to use that -- to use that term, I object to use  
6 that term. Investigator would be rather limited to  
7 mitigation, so I don't know that there is a real  
8 difference between the words. We are just using  
9 different words to describe the same thing.

10 THE COURT: All right. Without going into defense  
11 strategy, can you explain to me why you would need a  
12 separate investigator or a mitigation specialist as  
13 opposed to a mitigation specialist alone? Is there --  
14 I mean, if it is a matter of funding, then, you know,  
15 perhaps, additional funds could be appropriated for the  
16 mitigation specialist if need be, but I think I am just  
17 trying to figure out why you would need both.

18 MR. PORTER: And I assume gathering the  
19 prosecutor's remarks, is because they see this case as  
20 being different. I think at some point, I am gathering  
21 the State is going to, whoever the trier of fact is,  
22 whether it be a three-judge panel or a jury, is going  
23 to try to put into evidence, the facts from the  
24 underlying conviction.

25 THE COURT: I don't know.

JILL M. CUTTER, RPR  
(513) 785-6596

1 MR. PORTER: That's the only way that -- and that  
2 is an open question of how you do it in these  
3 particular cases, but because the State is going to try  
4 to put into evidence some of those facts, at that  
5 point, I think it becomes an obligation upon us to, in  
6 fact, reinvestigate at the trial phase to be able to  
7 address those facts as they come in.

8 MS. COOK-REICH: If I could add one further  
9 response, I believe in the Harvey Johnson case, Mr.  
10 Piper came down and indicated that he believed that the  
11 mitigation specialist's job was solely to help develop  
12 the theme of mitigation and not to investigate  
13 whatsoever.

03:25PM

14 In this particular case, we will need an  
15 investigator to help us locate witnesses and continue  
16 to pursue that, and we would ask for funds for both of  
17 those things.

18 THE COURT: Do you have proposed individuals with  
19 information as to their hourly billing rates available?

20 MS. COOK-REICH: Your Honor, I would propose Jason  
21 Quinlan who I have used in the past and this Court has  
22 approved him. Off the top of my head, I don't remember  
23 his hourly rate, but I thought it was \$65. It is the  
24 same as it was in the Harvey Johnson matter.

03:25PM

25 And Mr. Porter can speak as to the mitigation

JILL M. CUTTER, RPR  
(513) 785-6596

1 specialist.

2 MR. PORTER: What we would propose is we would use  
3 a mitigation investigator at the office. His policy to  
4 charge for that would be \$35 an hour. And would be  
5 asking for a hundred hours.

6 THE COURT: Okay. All right. And then with  
7 regard to mental health expert?

8 MS. COOK-REICH: We don't wish to disclose --

9 THE COURT: Do you have it available in an entry  
10 for me?

03:26PM

11 MS. COOK-REICH: We do not yet. As I indicated  
12 when we first spoke, we would like ex-parte on that  
13 because we would choose not to advise the prosecutor  
14 and which fields we are looking and Mr. Porter and I  
15 are still seeking particular experts.

16 THE COURT: Okay. Well, so you don't -- is it  
17 that you don't want to reveal at this time, or you  
18 don't have one at this time? It sounded like you said  
19 you are still seeking.

20 MS. COOK-REICH: A little bit of both, Your Honor.  
21 I can stand here and advise the Court that we are, in  
22 fact, going to use mental health experts. We have not  
23 yet narrowed the field.

03:26PM

24 THE COURT: All right. This is what I am going to  
25 do: For the time being, I am going to deny the request

JILL M. CUTTER, RPR  
(513) 785-6596



1 for ex-parte, for an ex-parte hearing because -- as to  
2 the motion for an investigator, as to the motion for a  
3 mitigation specialist. What I will -- I am going to  
4 grant the motions of the defense. I'm going to  
5 initially limit the investigator to a cap of \$1,000 at  
6 the hourly billing rate indicated, which I assume would  
7 be the same as the Johnson case.

8 MS. COOK-REICH: It is, Your Honor.

9 THE COURT: With regard to a mitigation  
10 specialist, same order; that I am going to cap it  
11 initially at a dollar figure of \$2,500 with the proviso  
12 that should, as the case develops, counsel require  
13 additional funds, that they can reapproach the Court,  
14 they can request an ex-parte hearing, which may or may  
15 not be granted depending on the circumstances, and upon  
16 good cause shown, may be entitled to additional funds.  
17 But again, it would be on the basis of good cause  
18 shown.

19 With regard to the mental health expert, what I am  
20 going to ask counsel to do is to -- I do not want to  
21 grant an order without knowing who I'm appointing, what  
22 their billing rate is, maybe even what their background  
23 is. If it is someone that is unfamiliar to the Court  
24 that has not been appointed by the Court previously, I  
25 would imagine that the Court may want to know a little

JILL M. CUTTER, RPR  
(513) 785-6596

1 bit more information about their background, a CV,  
2 something like that. And I may grant this in terms of  
3 an ex-parte hearing to be able to review that. I need  
4 to know the initial information first.

5 MS. COOK-REICH: Obviously, Your Honor, that is  
6 part of what we don't wish to disclose to the  
7 prosecutor in regards to who we are looking at, their  
8 CV.

9 THE COURT: I understand. I'm not asking you to  
10 reveal that to counsel or to myself at this point in  
11 time. I am asking that we address the issue when you  
12 are prepared to provide that information. I mean,  
13 right now, I don't see that you are prepared to go  
14 forward and provide that information to the Court. I  
15 don't think that we should go into an ex-parte hearing  
16 to discuss it when we are not going to be able to get  
17 to a final resolution of it. So what I am suggesting  
18 is that we come back as quickly as you can have that  
19 information available.

03:29PM

20 MS. COOK-REICH: And we will, Your Honor. We are  
21 scheduled to meet with one particular expert on the  
22 17th and we will be back forthwith.

03:30PM

23 THE COURT: Well, I am thinking that we should set  
24 something now.

25 MS. COOK-REICH: That is fine.

JILL M. CUTTER, RPR  
(513) 785-6596

1 THE COURT: What I don't want to do is, you know,  
2 have the matter linger because you get distracted by  
3 the other issues that you are dealing with, and then we  
4 are dealing with this issue at the 11th hour and it  
5 jeopardizes the hearing date that we have. So if you  
6 can give me a ballpark on -- you are indicating that  
7 you're meeting with someone you are going to consult  
8 with on the 17th. Would it be possible to come back in  
9 early April?

10 MS. COOK-REICH: We would like to come back before  
11 then, Your Honor.

12 THE COURT: Well, the Court is unavailable --

13 MS. COOK-REICH: -- the 20th and 30th, as I am.

14 THE COURT: Right. That is the problem and I  
15 don't know -- I am -- I'm going to be involved in an  
16 eight or nine day trial starting Monday, so I am going  
17 to have limited availability before the 20th. Although  
18 I could put something in at the end of the day or over  
19 a lunch hour or something like that.

20 MS. COOK-REICH: Would you have any time available  
21 on either March 18th or 19th, Your Honor?

22 THE COURT: Counsel, what is -- do you have a  
23 preference on either the 19th --

24 MS. COOK-REICH: I prefer the 18th.  
25

JILL M. CUTTER, RPR  
(513) 785-6596



1 THE COURT: So do I. Either the end of the day or  
2 first thing in the morning on the 18th, how do your  
3 calendars look, Mr. Oster or Mr. Eichel and it may be  
4 brief. If I do decide to grant an ex-parte hearing,  
5 obviously your participation would be pretty limited at  
6 the beginning and then obviously we would carry on  
7 without you. But at least initially, I would want you  
8 to be there. And in the event that we do not need an  
9 ex-parte hearing, do you have a preference?

10 MR. OSTER: I think, talking to Mr. Eichel, I  
11 don't think either one of us has a preference  
12 necessarily.

03:32PM

13 MS. COOK-REICH: No preference. In the morning  
14 Mr. Porter needs to come down from Columbus, so I would  
15 prefer not first thing in the morning in case we get  
16 weather.

17 THE COURT: Why don't we look at 4:00 on Tuesday  
18 the 18th.

19 MR. OSTER: We going to be able to get a transport  
20 order? Just wanted to make sure, Your Honor.

03:32PM

21 THE COURT: All right. Joe, do you have a  
22 pretrial order for me to --

23 THE BAILIFF: Yes, Your Honor.

24 THE COURT: Are we good on that date?

25 MS. COOK-REICH: Yes, Your Honor. Your Honor, Mr.

JILL M. CUTTER, RPR  
(513) 785-6596

1 Porter had a suggestion in case we go long, would you  
2 be okay with setting that hearing at 3:00 instead of  
3 4:00 on that day?

4 THE COURT: I will be in a jury trial. 4:00 is  
5 what I am going to have to do. Just for clarification,  
6 my feeling on the ex-parte hearings is that they are  
7 not constitutionally required. I think the law in  
8 Ohio, and my interpretation of the Ake decision, is  
9 that it is not constitutionally required, but that an  
10 ex-parte hearing may be necessary at times to protect  
11 counsel's defense strategy. 03:35PM

12 I believe I was able to rule today on your request  
13 without requiring you to reveal any defense strategy  
14 inappropriately or too early in the proceeding and that  
15 is why I did not grant that motion because I feel that  
16 it was mooted by the Court's granting of the underlying  
17 request.

18 With regard to whether we would have an ex-parte  
19 hearing regarding the last issue, quite frankly it's  
20 going to depend on whether the Court -- how much  
21 information the Court needs to hear from defense  
22 counsel. You have to make a showing, obviously the  
23 showing contemplated by the statute by the Mason case,  
24 as to I guess the particularized need for the expert.  
25 And if the Court feels or is convinced that you would 03:35PM

JILL M. CUTTER, RPR  
(513) 785-6596

1 have to get into defense strategy in order to meet that  
2 burden then I would grant an ex-parte hearing. But if  
3 I feel that I can make the ruling without requiring or  
4 without having you get into that issue too deeply, then  
5 we may be able to deal with it without an ex-parte  
6 hearing. Just so you understand where I am coming from  
7 on the issue and so that the record has some eyes on  
8 that issue. All right.

9 Anything further, then, that we need to take up on  
10 this issue?

03:36PM

11 MR. OSTER: No, Your Honor.

12 MS. COOK-REICH: No, Your Honor.

13 THE COURT: All right. All right. The way that I  
14 conduct the three-judge draw, I have a beautiful gray  
15 bucket. Inside the bucket are my business cards. All  
16 have my name on the one side, so that they are all the  
17 same size, so that there is no way to be able to tell  
18 anything from looking at the outside. On each of the  
19 cards on the other side, there is the name of one of  
20 the general division judges, and I have already removed  
21 Judge Sage from this panel.

03:37PM

22 The order in which the judges are drawn will be  
23 the presumptive order in which they would be called  
24 upon to sit on any perspective three-judge panel. We  
25 do this drawing as a courtesy to the defense counsel so

JILL M. CUTTER, RPR  
(513) 785-6596



1 that you have some idea of the pecking order of judges  
2 that would be sitting on a three-judge panel in case  
3 that would be an option chosen by defense counsel, and  
4 obviously, if it is required in the case as well.  
5 Obviously, it does not in any way impact any motions  
6 that you may file regarding whether the three-judge  
7 panel is required or not. That is a separate issue.  
8 It will be determined separately.

9 With that being said, either Mr. Porter or Ms.  
10 Cook-Reich, either one of you --

03:38PM

11 MS. COOK-REICH: We would like Mr. Davis to draw  
12 those if that would be okay with the Court.

13 THE COURT: Any objection?

14 MR. OSTER: No objection. But in doing that, are  
15 that I waiving any argument as to this procedure at  
16 all?

17 MR. PORTER: My understanding from the Court's  
18 statement a minute ago is we reserved all rights to  
19 object.

20 THE COURT: Well --

03:38PM

21 MR. PORTER: And whose hand is in the bucket, I  
22 have a hard time believing that is going to be an  
23 issue. We would waive any and all issues with respect  
24 to whether it's Ms. Cook that draws, Mr. Davis that  
25 draws, or myself. In fact, we are requesting that Mr.

JILL M. CUTTER, RPR  
(513) 785-6596

1 Davis make the draw.

2 THE COURT: Ms. Cook, if you would come and get  
3 this. Satisfy yourself first that the names of all of  
4 the judges are in there, and that Judge Sage is not in  
5 there. And then, you can hold the bucket while Mr.  
6 Davis draws the name.

7 MS. COOK-REICH: Your Honor, I am satisfied with  
8 the five cards that hold the judges minus Sage. Your  
9 name is not in there.

10 THE COURT: I would be the presiding judge and  
11 then two other judges would come in the order drawn.

03:39PM

12 MS. COOK-REICH: The first name is Judge Spaeth.

13 THE COURT: All right. And the record will  
14 reflect that Mr. Davis drew the name of Judge Spaeth  
15 first.

16 MS. COOK-REICH: Second name is Judge Pater.

17 THE COURT: Judge Pater was drawn by Mr. Davis  
18 second.

19 MS. COOK-REICH: Third name is Judge Powers.

20 THE COURT: Judge Powers was drawn by Mr. Davis,  
21 third.

03:40PM

22 MS. COOK-REICH: Fourth name is Judge Hedric.  
23 There is only one left. It's -- Judge Oney, would be  
24 the last name, Your Honor.

25 THE COURT: All right. All right. For the

JILL M. CUTTER, RPR  
(513) 785-6596

1 record, that will be the presumptive order. Of course,  
2 this will be subject to availability. My common  
3 practice is once we have conducted this drawing, I will  
4 do two things: I will prepare an entry reflecting that  
5 this is the result of the three-judge draw for a  
6 prospective three-judge panel. I will also send an  
7 e-mail to the other judges advising them of the date of  
8 the hearing, and the order of the draw and asking them  
9 to keep their calendars as open as their dockets will  
10 allow, and to give them as much advanced notice as  
11 possible in that regard.

03:41PM

12 I will then print out a copy of that e-mail and  
13 have that filed in the case file as well, so that there  
14 won't be any traffic going on that isn't reflected in  
15 the file itself. Wish to be heard on that recommended  
16 procedure?

17 MS. COOK-REICH: No, Your Honor.

18 THE COURT: All right. All right. Anything  
19 further, then, that we need take up at today's hearing?

20 MS. COOK-REICH: No, Your Honor.

03:41PM

21 THE COURT: And we are back on the 18th of March  
22 at 4:00 PM.

23 MS. COOK-REICH: Thank you.

24 THE COURT: Counsel, if you would come and sign  
25 the pretrial order, please. Mr. Eichel, do you wish to

JILL M. CUTTER, RPR  
(513) 785-6596



1 sign off?

2 MS. COOK-REICH: Your Honor, in regards to  
3 transporting Mr. Davis back and forth, we had been  
4 trying to discuss that with him. Mr. Davis would be  
5 fine remaining in the Butler County Jail pending the  
6 18th. It's the 6th today. That would be 12 days.  
7 Obviously, the transport back and forth is costly and  
8 12 days isn't long, if the Court wishes to have him  
9 remain here.

10 THE COURT: Do you know whether the jail would  
11 have any preference one way or the other?

12 DEPUTY BAKER: I don't know what the break off  
13 would be or what would be a preference.

14 THE COURT: well, we will to ahead -- unless I  
15 hear -- does the State have any input on that?

16 MR. OSTER: From behind me, I am hearing that part  
17 of the victim's family objecting to that. Your Honor,  
18 I don't know, you know, the sheriff with not having any  
19 hearings until then, for 12 days, obviously, Mr. Davis  
20 it's my understanding is still on death row. It may be  
21 better to send him back there instead of placing that  
22 burden our sheriff when there isn't a hearing for  
23 12 days.

24 MS. COOK-REICH: Your Honor, there is the right to  
25 meet with his counsel during that time period, also.

JILL M. CUTTER, RPR  
(513) 785-6596

1 THE COURT: You need access -- well, Youngstown is  
2 almost as close to Mr. Porter as we are here.

3 MS. COOK-REICH: It is, but Mr. Porter and I have  
4 made it a point to try to visit with Mr. Davis jointly  
5 together, because it is a joint team effort.

6 THE COURT: Right. All right. Okay. We are  
7 going to go ahead and allow him to remain in the Butler  
8 County Jail until the hearing on the 18th. How long  
9 after that? I mean, because we are not going to have  
10 him here the entire time until august obviously.

03:44 PM

11 MS. COOK-REICH: No, after the 18th hearing, he  
12 can go back. I am just wondering when we are back,  
13 what does the calendar show?

14 MS. COOK-REICH: Not 'til June.

15 THE COURT: All right. That will be the order.

16 MS. COOK-REICH: Thank you, Your Honor.

17 THE COURT: If there is nothing further, then, we  
18 will be in recess on this matter until 4:00 PM on  
19 March 18th.

20 MR. OSTER: Thank you, Your Honor.

03:44 PM

21 (Proceedings concluded at this time 3:44 PM.)  
22  
23  
24  
25

JILL M. CUTTER, RPR  
(513) 785-6596

1 STATE OF OHIO )

2 ) SS. REPORTER'S CERTIFICATE

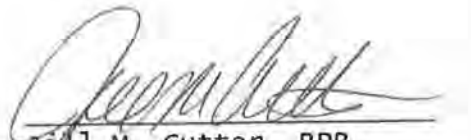
3 COUNTY OF BUTLER )

4 I Jill M. Cutter, RPR, do hereby certify that I am  
5 a Registered Professional Reporter and Notary Public within  
6 the State of Ohio.

7 I further certify that these proceedings were  
8 taken in shorthand by me and by electronic means at the time  
9 and place herein set forth and was thereafter reduced to  
10 typewritten form, and that the foregoing constitutes a true  
11 and accurate transcript, all done to the best of my skill and  
12 ability.

13 I further certify that I am not related to any of  
14 the parties hereto, nor am I in any way interested in the  
15 result of the action hereof.

16 Dated at Hamilton, Ohio, this 22 day of December,  
17 2009.

18   
19 Jill M. Cutter, RPR  
20 Official Court Reporter  
21 Butler County Common Pleas  
22 Hamilton, Ohio 45011  
23  
24  
25

JILL M. CUTTER, RPR  
(513) 785-6596



IMAGED

COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO

FILED  
7:10 JAN -8 PM 2:41

CINDY CARPENTER  
BUTLER COUNTY  
CLERK OF COURTS

STATE OF OHIO,

Plaintiff,

Case No. CR-1983-12-0614  
CA -09-10-263

vs.

HONORABLE ANDREW NASTOFF

VON CLARK DAVIS,

FILED BUTLER CO.  
COURT OF APPEALS

ORIGINAL

Defendant.

JAN 08 2013

CINDY CARPENTER  
CLERK OF COURTS

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

MARCH 18, 2008

JILL M. CUTTER, RPR  
(513) 785-6596

1 APPEARANCES:

2

3 on behalf of the plaintiff:

4 MICHAEL A. OSTER, JR., ESQ.  
5 DAN EICHEL, ESQ.  
6 Assistant Butler County Prosecuting Attorney  
7 11th Floor  
8 315 High Street  
9 Hamilton, Ohio 45011

10 on behalf of the defendant:

11 MELYNDA COOK-REICH, ESQ.  
12 Repper, Pagan, Cook  
13 1501 First Avenue  
14 Middletown, Ohio 45044  
15 and  
16 RANDALL PORTER, ESQ.  
17 Assistant State Public Defender  
18 250 East Broad Street  
19 Suite 1400  
20 Columbus, Ohio 43215  
21  
22  
23  
24  
25

JILL M. CUTTER, RPR  
(513) 785-6596

## 1 Transcript of Proceedings

## 2 Afternoon Session

3 -----

4 THE COURT: We are on record in State of Ohio vs.  
5 Von Clark Davis, CR 83-12-0614. The record will  
6 reflect that Von Clark Davis appears along with  
7 counsel, Mr. Porter and Ms. Cook-Reich. On behalf of  
8 the State of Ohio, its two assistant county prosecutors  
9 Dan Eichel and Mike Oster appear on their behalf.

10 Counsel, we are here -- I believe this, if memory  
11 serves, we were a couple of weeks ago with regard to  
12 motions for funds -- well, a motion for an ex-parte  
13 hearing and then motion for funds to retain certain  
14 experts. There were two motions granted for an  
15 investigator, for a mitigation specialist. Before we  
16 go -- and then we kicked over to today, the motions  
17 regarding mental health expert because as of the last  
18 hearing, it's my understanding that there were no  
19 particular experts that had been identified by the  
20 defense at that time. And so we set it over to  
21 today's date for further proceedings on that motion.

04:11PM

04:12PM

22 Before we get into that, I would ask -- I have not  
23 yet seen the entry granting the motions from last time.  
24 You have those?

25 MS. COOK-REICH: I have those.

JILL M. CUTTER, RPR  
(513) 785-6596



1 THE COURT: Has the prosecution seen them as to  
2 form?

3 MS. COOK-REICH: Probably not. They are -- I had  
4 my secretary pull the entries from the Harvey Johnson  
5 case.

6 THE COURT: Fair enough.

7 MS. COOK-REICH: Except for the numbers that were  
8 different in this particular one.

9 THE COURT: I just want you to satisfy yourself  
10 that the form of the order comports with the language.  
11 I mean, the amounts that I ordered the last time we  
12 were here.

04:12PM

13 MR. OSTER: The only thing that I --

14 THE COURT: I am at a disadvantage since I don't  
15 have them.

16 MS. COOK-REICH: I apologize I just brought the --

17 THE COURT: That's okay. I will listen to what  
18 you have to say. I just have to see what you are  
19 talking about. Okay. You were going to say, Mr.  
20 Oster?

04:13PM

21 MR. OSTER: Yes, Your Honor. In looking at and I  
22 am trying to -- I'm checking the outside of my folder.  
23 I am trying to check my exact notes. For the  
24 mitigation specialist, I had two things written down,  
25 which seem to be a little strange with each other. I

JILL M. CUTTER, RPR  
(513) 785-6596

1 believe and I am just trying to make sure I am correct,  
2 one place I had written down 100 hours, another place I  
3 had written down \$25,000 as a cap.

4 MC. COOK-REICH: \$25,000?

5 MR. OSTER: \$2,500, I apologize, as a cap. So I  
6 am just trying to figure out. If it's \$35, then 110  
7 hours would be obviously more than 25. I am just --

8 THE COURT: There was a request for 100 hours. I  
9 granted the motion with a cap of \$2,500 initially, with  
10 a provision that upon -- for good cause shown they can  
11 return to the Court to seek additional funds should  
12 that prove necessary.

04:14PM

13 MS. COOK-REICH: I prepared the entry as you had  
14 granted it. If we need additional funds on anything,  
15 we would always coming back to the Court.

16 THE COURT: With regard to the investigator, quite  
17 frankly, the reason that the initial authorized amount  
18 is lower, is given the procedural posture of the case  
19 that we don't have a trial. I thought that at least  
20 initially, that \$1,000 figure may suffice, but for some  
21 reason and obviously if that should prove not to be the  
22 case, again, for good cause shown, I would entertain  
23 further motion.

04:14PM

24 With that being said, I am going to go ahead and  
25 sign these entries. Who wants to see that they are

JILL M. CUTTER, RPR  
(513) 785-6596

1 filed?

2 MS. COOK-REICH: I will make sure that they are  
3 filed.

4 THE COURT: All right. And if you need to make  
5 copies, when we get done with this hearing, Joe will  
6 allow them to use the copier so that the prosecution  
7 gets their copies, Court gets a copy and defense gets  
8 sufficient copies. Anything further we need to take up  
9 on that matter?

10 MS. COOK-REICH: No, Your Honor.

04:15PM

11 MR. EICHEL: If Your Honor please, there is --  
12 this occurred to me after the previous hearing, so in  
13 the -- along the same lines of their getting their  
14 investigation underway, it occurred to me that maybe  
15 the State should see what we can do about getting both  
16 sides up to speed on the prison records.

17 The federal District Court, Federal Court of  
18 Appeals has already said that there is potential  
19 mitigating evidence out there in the custody of the  
20 State, which make it Brady material, the institutional  
21 records of the defendant. We contacted the state  
22 institution, specifically the Ohio State penitentiary  
23 in Youngstown, Ohio, and they told us we can get those  
24 records upon a court order.

04:16PM

25 In that regard, I have taken the liberty of

JILL M. CUTTER, RPR  
(513) 785-6596



1 preparing an entry that gives the records, the same  
2 records to both sides so that that complies with our  
3 requirement to give any potential exculpatory evidence  
4 in way of mitigation and in the way of evidence  
5 favorable to the accused and material to his  
6 punishment, which is there in the institutional  
7 records.

8 I have taken the liberty of preparing an entry  
9 that grants both sides that institutional record, a  
10 certified copy of it. So that in other words, it would  
11 save them a lot of money as far as an investigator's  
12 time in getting these records. We are doing it for  
13 them.

04:17PM

14 THE COURT: Has the defense seen their proposal?

15 MS. COOK-REICH: No, and we would object to that,  
16 Your Honor.

17 THE COURT: On the basis of?

18 MS. COOK-REICH: On the basis that this sounds  
19 like the way for the State to try to obtain our  
20 client's records that we would not acquiesce to have  
21 them have.

04:17PM

22 THE COURT: These are public records held by State  
23 of Ohio, correct?

24 MR. PORTER: I wanted to respond, I am sorry, Your  
25 Honor. I am interrupting. They are not public

JILL M. CUTTER, RPR  
(513) 785-6596

1 records.

2 MS. COOK-REICH: If we choose to -- if we have  
3 difficulty in obtaining the records that we need and we  
4 believe that a court order will assist in that, as Mr.  
5 Eichel has said that the OSP has said that they need a  
6 court order, we will certainly come to this Court and  
7 request such. But it is disingenuous for the  
8 prosecutor to stand here and say that they are going to  
9 try to help us out on this matter. What it sounds like  
10 is they want a copy of our client's record without us  
11 first seeing it, whether we decided to use it or not.  
12 And Mr. Eichel, would have no way of knowing whether  
13 there is mitigation evidence in there or not. He is  
14 portraying that to the Court for the reason for getting  
15 it.

04:18PM

16 THE COURT: Well, I can say this: That I have  
17 never known Mr. Eichel to be disingenuous based on my  
18 experience with him. There are obviously, tremendous  
19 restrictions on what the State would be able to present  
20 at any resentencing hearing that are governed, you  
21 know, the statutory scheme. What advantage the State  
22 would gain by having a copy of those records, I mean, I  
23 don't see it. I mean, there are -- they are going to  
24 be restricted on what they are going to be able to use  
25 or be able to present. The idea I imagine would be so

04:18PM

JILL M. CUTTER, RPR  
(513) 785-6596

1 that there could be no claim that there was a failure  
2 to provide -- if there is any ulterior motive so to  
3 speak, I would think it is simply to assure that there  
4 is no claim thereafter that they had failed to exercise  
5 due diligence to assure that there was no mitigating  
6 evidence or Brady material in the possession of the  
7 state that they could have turned over. And so I  
8 guess if there is any ulterior motive, I would see that  
9 as being the only one and I think that that is  
10 consistent with their obligation.

04:19PM

11 Now, as far as whether I am going to sign the  
12 order, I will take it under advisement. Let me see the  
13 order.

14 MS. COOK-REICH: I placed it back on the  
15 prosecutor's desk.

16 MR. EICHEL: Your Honor, please, for the record  
17 the impetus that this -- where I am coming from, it was  
18 in a case a number of years ago, probably more than ten  
19 years ago, and it was either counsel for this defendant  
20 at that time, but I was actually accused of not giving  
21 Brady material once when I gave part, but not all of  
22 the institutional records of the person who was  
23 standing trial for a capital offense. I was somewhat  
24 taken back by the accusation then that I was being  
25 unethical and not giving over the records in the

04:20PM

JILL M. CUTTER, RPR  
(513) 785-6596



1 custody of the State. So that is where I am coming  
2 from right now.

3 THE COURT: All right. I understand, and all of  
4 the comments regarding speculation as to motives aside,  
5 I will review the entry. I will review the applicable  
6 law, and I will make a determination as to whether I  
7 would sign entry or not.

8 MS. COOK-REICH: Can I have a second, Your Honor,  
9 with Mr. Porter?

10 THE COURT: Yes. Nothing further on that, Your  
11 Honor.

04:21PM

12 THE COURT: All right. I'm just and the reason I  
13 am taking it under advisement, is in a case like this,  
14 I am not going to sign anything quite frankly without  
15 look into it fully and completely. I am taking what  
16 both counsel have said to me and I am going to do my  
17 own additional looking into the matter and pertinent  
18 research and I will determine if it is appropriate to  
19 sign.

20 with that being said, let's move onto the matter  
21 of mental health expert or experts. There is a pending  
22 motion to proceed ex-parte, and I believe that I  
23 communicated that my view of the State of the law Ohio  
24 on that is that it is -- can be at times appropriate  
25 ,if it would require the defense to prematurely reveal

04:22PM

JILL M. CUTTER, RPR  
(513) 785-6596

1 strategic matters, matters of that nature or  
2 attorney-client issues, but it's not always necessary.  
3 I guess what I was trying to determine is, you know, if  
4 you have a proposed mental health expert that you are  
5 seeking assistance for mitigation, I am inclined to  
6 grant that. The law appears to view favorably, you  
7 know, such a situation. If there is anything unusual  
8 or outside of the ordinary, in the request, you know,  
9 above and beyond the requests that I have entertained  
10 in other similar types of cases, then we may have to  
11 have a hearing for you to be able to make that case.  
12 But I am, you know -- I am of a mind that if you are  
13 requesting a reasonable amount of funds to retain as  
14 long as I can assure that it is an appropriately  
15 credentialed expert that you are requesting, then I am  
16 inclined to grant that.

04:23PM

17 MS. COOK-REICH: On that matter, Mr. Porter and I  
18 have contacted two defense psychological experts that  
19 are willing to take on Mr. Davis' case. They are in  
20 two different fields. I don't wish to disclose those  
21 at this time unless the Court would grant us an  
22 ex-parte hearing.

04:24PM

23 THE COURT: So you are asking for more than one?

24 MS. COOK-REICH: I am. They have two different  
25 specialties. The first has an hourly rate of \$180

JILL M. CUTTER, RPR  
(513) 785-6596

1 dollars an hour. We estimate that it will take about  
2 32 hours of her work excluding possible testimony.  
3 Ten of those hours are reviewing the records in the  
4 case and there is a multitude of records; two and a  
5 half banker boxes of records relative to mitigation  
6 that have been gathered over the years.

7 The second expert in a separate field is \$270 an  
8 hour and we estimate that that particular expert will  
9 take 28 hours of time excluding testimony, also. Those  
10 figures then come up to \$5,760 for the first  
11 psychological expert, and the second in a different  
12 field, we estimate at \$8,100. And those are excluding  
13 trial testimony if that is deemed necessary.

14 I will say, that if this Court would like to have  
15 their CVs, we have those available for the court. We  
16 prefer to do that ex-parte. We have a breakdown of the  
17 hours and how those are spent. We also prefer to do  
18 that ex-parte. We have our mitigation specialist here  
19 to testify as to the necessity for the different  
20 psychological experts, and we are certainly prepared to  
21 go forward on the ex-parte if the Court wishes to do  
22 so. Obviously, I know from past experience that those  
23 numbers are over and above what would be used for let's  
24 say Dr. Hopes who is used in many other prior  
25 psychological evaluations. And we don't wish to

04:25PM

04:25PM

JILL M. CUTTER, RPR  
(513) 785-6596



1 pursue.

2 Dr. Hopes at this time for this particular case.

3 THE COURT: All right. Well, what I would  
4 indicate is the number of experts being requested and  
5 the amounts are higher than what would normally be  
6 contemplated by the Court, so this is the position that  
7 I am in: If the State is indicating that they have no  
8 issue, that they would acquiesce in me signing an order  
9 for those amounts, then we don't need to have an  
10 ex-parte hearing. However, if we are not in a  
11 position where there is acquiescence on that issue,  
12 then I think that I am going to need to grant the  
13 request for an ex-parte hearing so that I can have them  
14 establish their prima facia basis for the expenditure.

04:26PM

15 MR. OSTER: Your Honor, if I may be heard?

16 THE COURT: Yes.

17 MR. OSTER: First of all in what we have just  
18 heard, which was there will be two experts, different  
19 fields, and their hourly rate, I did not hear that  
20 particularized showing, probability that they would aid  
21 in his defense in any way, did not hear that if denied,  
22 would lead to an unfair trial. Further, I would  
23 submit to the Court that an indigent defendant doesn't  
24 necessarily have the right to choose their particular  
25 psychiatrist. The Court stating these amounts have

04:27PM

JILL M. CUTTER, RPR  
(513) 785-6596

1        been higher, I would urge the Court defendant's due  
2        process rights to state provided psychiatrist does not  
3        include the right to a psychiatrist of the defendant's  
4        choice. *Thompson vs. Bell*, 315 Federal 3d, 566 our of  
5        the 6th Circuit in 2003. Furthermore, in, *State vs.*  
6        *Johnson*, a 2006 case out of the Ohio Supreme Court when  
7        they are talking about ordering a competency hearing  
8        after the guilt phase in a capital murder prosecution,  
9        it was required to provide access to a psychiatrist  
10       assistance on the issue of defendant's competency.  
11       They said that the defendant was not entitled to a  
12       psychiatrist of his choice. The Ohio Supreme Court,  
13       the 6th Circuit Court have said that. I don't think as  
14       well, with those numbers being high is why I would lead  
15       the Court to that. And as well, I don't think that  
16       when we were here last we talked about it, at least  
17       making a showing of the two prongs of the *Mason vs.*  
18       *Broom* test, I'm sorry *State vs. Mason*, both the Ohio  
19       Supreme Court 98, 88, and we have not heard that yet.

04:28PM

20       THE COURT: Right. And I recognize that, and I am  
21       assuming that counsel is being general before the Court  
22       determined whether it was going to be proceeding  
23       ex-parte or in an open hearing. And I had indicated  
24       previously that if there is a good faith representation  
25       that in order to meet that standard, the particularized

04:28PM

JILL M. CUTTER, RPR  
(513) 785-6596

1 showing required by Mason and by Broom, that I would be  
2 inclined to grant the motion for an ex-parte hearing at  
3 that point in time, so I think that is why we have only  
4 heard an initial general statement by defense.

5 MS. COOK-REICH: That is correct, Your Honor.

6 MR. OSTER: Your Honor, the other thing I would  
7 say is in our original motion, the contra to this -- I  
8 am trying to find it now exactly -- we did cite a case,  
9 *State vs. White*, the North Carolina case, 340 North  
10 Carolina, 264 out of 1995. It said that they needed to  
11 make the threshold showing of particularized need of  
12 the two factors that are very similar. And it said  
13 that they should do that, I believe that court, they  
14 should at least make that before being able to go to an  
15 ex-parte case.

04:29PM

16 THE COURT: Then that would undermine the purpose  
17 for the ex-parte hearing.

18 MR. OSTER: Again, there is no constitutional  
19 right to it, Your Honor.

20 THE COURT: I understand. All right. I am  
21 referring, I believe, it was the Peoples case, which is  
22 the language that I had cited to most recently. I  
23 think that is out of the Fourth. Ohio, quite frankly,  
24 has not addressed this issue as fully and completely as  
25 one might expect given the number of capital cases that

04:30PM

JILL M. CUTTER, RPR  
(513) 785-6596



1 have been decided by the Supreme Court in the state. I  
2 was quite surprised, quite frankly, to find that Ohio  
3 had developed this area regarding the ex-parte hearings  
4 more fully, but my understanding is that Peoples  
5 provides the most complete statement or analysis with  
6 regard to an Ohio case of the need and purposes for an  
7 ex-parte hearing.

8 That being said, what I am going to do at this time I  
9 am going to grant the defenses' request for an ex-parte  
10 hearing regarding the very specific and narrow issue of 04:30PM  
11 the funds to retain a proposed expert in the area of  
12 mental health. Those will be the only matters that  
13 will be discussed, and I just want to make that clear  
14 on the record, since the State will not be here. I  
15 want the record to be clear as to the scope of the  
16 hearing. And that will be the limited nature of the  
17 scope of the hearing.

18 Is there anything further before we go into the  
19 ex-parte hearing that we need to take up?

20 MS. COOK-REICH: There is something I wanted to 04:31PM  
21 bring up prior to proceedings on ex-parte that the  
22 State should be present for.

23 At our last hearing at the conclusion of that,  
24 after you had left the bench, I don't know if the  
25 prosecutor was still in the room, when Deputy Baker was

JILL M. CUTTER, RPR  
(513) 785-6596

1 getting prepared to take our client out the door, a  
2 spectator was present in the courtroom. He was a white  
3 male, I would say late thirties, mid-thirties, and he  
4 made what I considered to be a threat to our client  
5 in both his tone and demeanor and the exact wording was  
6 something like, we'll have a party ready for you when  
7 you get out. And I know that if he had made such a  
8 statement in the Court's presence, you would have  
9 instructed him to not do so. But we would like the  
10 Court to be aware of that. He is not present in the  
11 courtroom today. I don't know who he was. Our client  
12 did not know who he was, but he knew who our client  
13 was.

04:32PM

14 THE COURT: And I assume the security personnel  
15 heard that?

16 MS. COOK-REICH: Baker gave him a look. And then  
17 the man stepped back and left.

18 THE COURT: All right. Well, I will make security  
19 aware of that. And if you have any further  
20 description or identifying --

04:32PM

21 MS. COOK-REICH: He was probably 6'3", slim,  
22 probably weighed 160 or 170. He had blondish hair.

23 THE COURT: Well, obviously the security of every  
24 person present in this courtroom is a priority to the  
25 Court, and the Court wouldn't tolerate any such

JILL M. CUTTER, RPR  
(513) 785-6596

1 activity. Of course, it happened outside the Court's  
2 presence. All I can indicate is that I will assure  
3 that our security personnel, supervisor, are aware that  
4 an incident like this was alleged to have occurred and  
5 for them to have a heightened awareness of that issue  
6 from this point forward.

7 Anything further, then, that we need to address on  
8 that?

9 MS. COOK-REICH: No, Your Honor.

10 THE COURT: Anything further before we go into the  
11 ex-parte phase?

04:33PM

12 MR. OSTER: No, Your Honor. The only thing I  
13 would ask is, myself nor Mr. Eichel didn't hear  
14 anything -- maybe we were out of the courtroom -- about  
15 that situation.

16 THE COURT: All right. All right. Remind folks  
17 when we are back. I have my bench filled with  
18 documents from a civil case that I am trying.

19 MS. COOK-REICH: June 26th.

20 THE COURT: That is our motion hearing date?

04:33PM

21 MS. COOK-REICH: I believe so, yes, at 9:00 in the  
22 morning.

23 THE COURT: And everything else is still on  
24 schedule with regard to filings of motions, everything  
25 like that?

JILL M. CUTTER, RPR  
(513) 785-6596



1 MS. COOK-REICH: Yes, Your Honor.

2 THE COURT: All right. Thank you, and we will  
3 now go into the ex-parte phase of the hearing. I would  
4 ask that other than necessary personnel that the  
5 courtroom be cleared. The court reporter will be  
6 ordered to serve this portion of the transcript under  
7 seal.

8 MR. OSTER: Your Honor, just briefly, are you  
9 going to need us anymore today to come back to end the  
10 hearing? Do you want us to stick around?

04:34 PM

11 THE COURT: I don't anticipate. If you want to  
12 wait in the hallway just in the event that there is  
13 some other issue, but that is why I was trying to take  
14 up any other matters that we might need to address  
15 before we went into this, so that you would be able  
16 to -- I appreciate your inquiry. I think we are okay.

17 MR. OSTER: Thank you, Your Honor.

18 (At this time, an ex-parte hearing was held  
19 between the Court and attorneys for the defense, Mr.  
20 Porter and Ms. Cook-Reich, outside the presence of the  
21 assistant prosecutors, Mr. Eichel and Mr. Oster.)

22 - - - - -  
23 (Ex-parte hearing concluded at this time 5:51 PM.)

24 - - - - -  
25 THE COURT: All right. At this point, counsel,

JILL M. CUTTER, RPR  
(513) 785-6596

1       thank you.    We will see you in June.  All of you.  
2       see you before then obviously for the purposes of the  
3       entry, if you would also take care of presenting the  
4       envelopes, anything that you need to assure they are  
5       filed under sealed.  Don't leave that to the clerk's  
6       office.

7               MS. COOK-REICH:  Never.  Thank you.

8               THE COURT:  All right.  We will be back then on  
9       June 26, 9:00 in the morning.

10              (Proceedings concluded at this time.)  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

JILL M. CUTTER, RPR  
(513) 785-6596

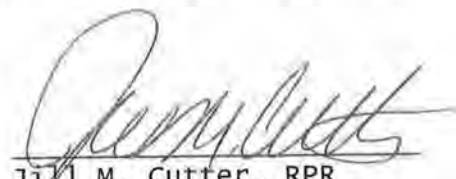
1  
2 STATE OF OHIO )  
3 ) SS. REPORTER'S CERTIFICATE  
4 COUNTY OF BUTLER )

5 I Jill M. Cutter, RPR, do hereby certify that I am  
6 a Registered Professional Reporter and Notary Public within  
7 the State of Ohio.

8 I further certify that these proceedings were  
9 taken in shorthand by me and by electronic means at the time  
10 and place herein set forth and was thereafter reduced to  
11 typewritten form, and that the foregoing constitutes a true  
12 and accurate transcript, all done to the best of my skill and  
13 ability.

14 I further certify that I am not related to any of  
15 the parties hereto, nor am I in any way interested in the  
16 result of the action hereof.

17 Dated at Hamilton, Ohio, this 22 day of December,  
18 2009.

19  
20   
21 Jill M. Cutter, RPR  
22 Official Court Reporter  
23 Butler County Common Pleas  
24 Hamilton, Ohio 45011  
25

JILL M. CUTTER, RPR  
(513) 785-6596



COURT OF COMMON PLEAS

BUTLER COUNTY, OHIO

FILED

2009 APR -2 PM 2:20

CINDY CARPENTER  
BUTLER COUNTY  
CLERK OF COURTS

STATE OF OHIO,

Plaintiff,

Case No. CR83-12-0614

HONORABLE ANDREW NASTOFF

vs.

VON CLARK DAVIS,

Defendant.

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

August 27, 2008

JILL M. CUTTER, RPR  
(513) 785-6596

268

1 APPEARANCES:

2  
3 On behalf of the plaintiff:

4 MICHAEL OSTER, ESQ.  
5 DAN EICHEL, ESQ.  
6 Assistant Prosecuting Attorneys  
315 High Street, 11th Floor  
Hamilton, Ohio 45011

7 On behalf of the defendant:

8 MELYNDA COOK-REICH, ESQ.  
9 1501 First Avenue  
Middletown, Ohio

10 RANDALL PORTER, ESQ.  
11 Office of the Ohio Public Defender  
250 East Broad Street, Suite 1400  
12 Columbus, Ohio 43215  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

JILL M. CUTTER, RPR  
(513) 785-6596

\* \* \* \* \*

09:21AM

09:21AM

VON CLARK DAVIS v. WARDEN  
CASE NO. 2:16-cv-00495  
STATE COURT TRANSCRIPTS - Page 794



1 were filed, the responses that I received so that I  
2 could make sure that we were comprehensive in dealing  
3 with the issues presented. So if the Court would -- or  
4 if counsel would indulge the Court in allowing me to  
5 kind of go through my list here and then see if there  
6 is anything that I have missed or something that I  
7 think would be more unlikely, that maybe something I  
8 have that you don't, just in the event there wasn't a  
9 copy that was provided to opposing counsel of  
10 something, something like that.

09:21AM

11 The first matter I have is a motion for disclosure  
12 of exculpatory evidence and the State's response  
13 thereto. And that I show being marked as motion D. Is  
14 that what everyone else has?

15 MS. COOK-REICH: Yes, Your Honor.

16 MR. OSTER: Your Honor, we do -- just to let the  
17 Court know, we have actually marked as C the motion to  
18 preclude the imposition of the death penalty because of  
19 Ohio's lethal injection constitutes cruel and unusual  
20 punishment.

09:21AM

21 THE COURT: I have that as P.

22 MS. COOK-REICH: I have that as E.

23 THE COURT: That is why it is good to do this.  
24 Let me go through what I have got and then we will see  
25 if we can make any changes so that we are all singing

JILL M. CUTTER, RPR  
(513) 785-6596

1 from the same sheet of music, so to speak.

2 what I have as E would be the motion to require a  
3 sealed copy of the prosecution's file be made a part of  
4 the record. So is everybody -- are we consistent on D  
5 and E so far?

6 MR. OSTER: The State is consistent with Your  
7 Honor.

8 THE COURT: The defense?

9 MS. COOK-REICH: I will remark it. I am making a  
10 list as what you have it marked as, so I will just redo  
11 ours.

09:21AM

12 THE COURT: Okay. Then I have as F, the motion to  
13 dismiss the capital specification contained in the  
14 indictment.

15 MR. OSTER: That's what the State has as well,  
16 Your Honor.

17 MS. COOK-REICH: Yes, Your Honor.

18 THE COURT: And if I am not referencing it on each  
19 of these, I have a response from the State as well. I  
20 have -- I guess I want to clarify because I have as G,  
21 the motion to suppress pretrial and trial  
22 identifications.

09:21AM

23 MS. COOK-REICH: Yes, Your Honor. It was marked  
24 as both G and K and I can advise the Court that the  
25 problem with that is that we fax filed it. And for

JILL M. CUTTER, RPR  
(513) 785-6596

1 several, two or three weeks it never showed up on the  
2 clerk's website despite me having a fax sheet. When I  
3 went up there, it appears that is what they ended up  
4 doing is both filing it when it was faxed and filing it  
5 when I got up there to check on it.

6 THE COURT: Okay. Well, the reason I want to go  
7 through this is so that the record has some eyes and is  
8 clear when we are referencing these motions and if we  
9 are using the shorthand letter to make sure that we  
10 are, you know, all talking about the same legal issue.  
11 So we will call that G.

09:22AM

12 MR. OSTER: Your Honor, we have that marked both  
13 as G and K.

14 THE COURT: Okay. Then we have -- for H I had  
15 just a supplemental discovery.

16 MS. COOK-REICH: Demand for discovery.

17 THE COURT: Right.

18 MR. OSTER: Yes, Your Honor.

19 THE COURT: All right. I, I have is the motion  
20 for pretrial disclosure of police reports and witness  
21 statements.

09:22AM

22 MR. OSTER: Correct, Your Honor.

23 THE COURT: J, I have as motion to compel law  
24 enforcement officials to provide prosecutor with all  
25 information acquired during investigation; is that

JILL M. CUTTER, RPR  
(513) 785-6596



1 consistent --

2 MR. OSTER: Yes.

3 MS. COOK-REICH: Yes.

4 THE COURT: All right. I did show that there was  
5 a separate K that was also a motion to suppress  
6 pretrial identifications and now I understand why that  
7 is the case, but it is one in the same motion.

8 MS. COOK-REICH: They are, Your Honor.

9 THE COURT: Let's proceed with that as G. And  
10 indicate that K was simply a duplicative filing of the  
11 same motion. I then have L being a motion concerning a  
12 right to a jury trial with respect to resentencing.

09:22AM

13 MR. OSTER: Yes.

14 MS. COOK-REICH: Yes.

15 THE COURT: I have M being a motion to preclude  
16 the State from seeking the death penalty.

17 MS. COOK-REICH: Yes, Your Honor.

18 THE COURT: I have N being a motion for additional  
19 funds to retain Dr. Mark Heath.

20 MS. COOK-REICH: Yes, Your Honor.

09:22AM

21 THE COURT: I have O as a motion to transcribe  
22 Grand Jury proceedings.

23 MR. OSTER: Yes.

24 MS. COOK-REICH: Yes, Your Honor.

25 THE COURT: And then I had as P and I think I did

JILL M. CUTTER, RPR  
(513) 785-6596

1 it just because it didn't have a letter on it, and I  
2 put it on the end. It sounded like you put it on at  
3 the beginning, but it was a motion to preclude  
4 imposition of the death penalty because of Ohio's  
5 lethal injection constitutes cruel and unusual  
6 punishment.

7 MS. COOK-REICH: Yes, Your Honor.

8 MR. OSTER: The reason the State did that without  
9 having a C and that motion was actually filed 5-27-08  
10 so it actually proceeded some of the other ones. We  
11 think it probably would run into motion N in some  
12 regard, so we actually just labeled it as C because of  
13 the date.

14 THE COURT: Can we all agree on what letter we  
15 want to call it? Does anybody care?

16 MS. COOK-REICH: I will call it by the letters you  
17 have just listed.

18 THE COURT: We don't have another P or something,  
19 right? Let's just call it that. All right. And that  
20 is what I have. Now, I also received filed on August  
21 25th the State's notice of additional authority that  
22 pertains to defendant's motions F, G, I, J, K, and L.  
23 That is the caption I have. Has the defense received a  
24 copy of that?

25 MS. COOK-REICH: Yes, Your Honor.

JILL M. CUTTER, RPR  
(513) 785-6596

1 THE COURT: All right. And then I believe there  
2 was also a filing that put the Court on notice of the  
3 decision of Judge Burge up in Lorain County on the  
4 Rivera matter and that was filed by the defense; is  
5 that correct?

6 MR. PORTER: That is correct, Your Honor.

7 THE COURT: All right. From the State's  
8 perspective, am I missing anything?

9 MR. OSTER: There was another -- it is called  
10 State's supplemental authority for motion C, which is  
11 now motion P that was filed on August 25th. I did  
12 notify by e-mail both Ms. Cook-Reich and Mr. Porter  
13 about that. I had asked for the runner in our office  
14 to bring it down to Your Honor. I apologize if it has  
15 not gotten there.

16 It is two very brief cases discussing the U.S.  
17 Supreme Court case, as well as this morning I gave Ms.  
18 Cook-Reich another case, which is two paragraphs.

19 THE COURT: Do you have an additional copy of that  
20 for the Court? It may be in my in box, but if you have  
21 it --

22 MR. OSTER: I will be more than happy to give Your  
23 Honor the copy that I have.

24 MS. COOK-REICH: I did get a copy from Mr. Oster.

25 THE COURT: If you are able to function without

JILL M. CUTTER, RPR  
(513) 785-6596



1 that copy, I would appreciate it. And do you have  
2 copies of those cases?

3 MR. OSTER: I have marked-up copies of those  
4 cases.

5 THE COURT: That's fine.

6 MR. OSTER: If Your Honor would like to enter a  
7 recess, I would be happy to pull them off.

8 THE COURT: That's fine. Other than that, then,  
9 do we have all of the same motions?

10 MR. OSTER: Yes.

09:22AM

11 MS. COOK-REICH: Yes, Your Honor.

12 MR. OSTER: If Your Honor would like, I do have  
13 the one I gave today, I do have a copy of that that is  
14 clean.

15 THE COURT: That is one in addition to the ones  
16 that are marked here?

17 MR. OSTER: Yes, Your Honor.

18 THE COURT: McKnight. If you have an extra copy  
19 that would be nice. And then Mr. Porter or Ms.  
20 Cook-Reich, my list of the motions that are pending,  
21 does that correspond with your respective lists or have  
22 I missed something that you have that I did not?

09:22AM

23 MS. COOK-REICH: Your Honor, that covers all of  
24 the motions that we had listed pending. Just to bring  
25 to the Court's attention, as I am sure you are aware,

JILL M. CUTTER, RPR  
(513) 785-6596

1 that the motions that we filed, the motion and the  
2 amended motion and the reply relative to the March 31st  
3 order to rescind it relative to the ODRC records, that  
4 is still pending in the Ohio Supreme Court. We filed a  
5 notice of appeal on that.

6 THE COURT: I think the last time that we were in  
7 court and again, I will just state this, memorialize  
8 this for the record and then if counsel has anything in  
9 addition that they want to state on the record I will  
10 give them that opportunity. I believe the last time  
11 all of us were present in court that matter was still  
12 pending before the 12th District, that since that time  
13 this Court has received a decision from the 12th  
14 District indicating that it found that the Court's  
15 order was not a final appealable order, and that they  
16 have overruled the appeal or dismissed the appeal or  
17 whatever the appropriate language they use was and that  
18 since then, there was a notice of appeal filed with the  
19 Ohio Supreme Court on that issue. And that was the  
20 last I heard of the matter.

21 MS. COOK-REICH: That is correct, Your Honor. We  
22 were trying to find the date. I believe it was filed  
23 on August 15th. It is pending in the Ohio Supreme  
24 Court. We bring that to the Court's attention because  
25 we would indicate that given that that is pending up in

JILL M. CUTTER, RPR  
(513) 785-6596

1 the Ohio Supreme Court that that would stay these  
2 proceedings, also.

3 THE COURT: All right. Is there an additional  
4 argument above and beyond what we have talked about  
5 last time with regard to the stay? I mean, is there  
6 anything -- why would it stay all of these proceedings?

7 MS. COOK-REICH: The matter is pending before the  
8 Ohio Supreme Court.

9 THE COURT: On that issue.

10 MS. COOK-REICH: On that issue. I believe that  
11 that issue also involves, at least according to the  
12 prosecutor's request for those records, indicates that  
13 they need to review those records for Brady materials,  
14 which is an issue we are going to be dealing with today  
15 also.

16 THE COURT: All right. Anything else?

17 MR. OSTER: No, Your Honor.

18 THE COURT: All right. These are the defense  
19 motions. Do you have a proposed, I guess first of all  
20 I want to ask, do any of these motions -- as we sit  
21 here today, do you have testimony or evidence that you  
22 wish to present on any of those motions and if so, I  
23 would propose that we deal with those first.

24 MS. COOK-REICH: We have subpoenaed several  
25 witnesses, Your Honor, and --

JILL M. CUTTER, RPR  
(513) 785-6596



1 THE COURT: On which motion?

2 MS. COOK-REICH: On motions I had -- I am trying  
3 to get the right numbers now using your numbers. D.

4 THE COURT: Exculpatory evidence?

5 MS. COOK-REICH: Exculpatory evidence.

6 THE COURT: Okay.

7 MS. COOK-REICH: H, which is the limited demand  
8 for discovery. J, motion to compel law enforcement  
9 officials to provide prosecuting attorney with all  
10 information acquired during the course of the  
11 investigation. I, motion for pretrial disclosure of  
12 police reports and witness statements.

09:24AM

13 Mr. Porter reminded me that they don't go to that.  
14 I am sorry. They go to G, which is the motion to  
15 suppress pretrial and trial identifications.

16 THE COURT: Oh, okay. And they don't go to which  
17 one?

18 MS. COOK-REICH: They don't go to the previous  
19 ones that I discussed, D, H, I or J.

20 THE COURT: So it is only G? And is that a  
21 witness that you have subpoenaed?

09:25AM

22 MS. COOK-REICH: Several witnesses, Your Honor.

23 THE COURT: On G. One moment, Mr. Eichel.

24 MS. COOK-REICH: Mr. Porter and I met and we are  
25 not prepared today because we set this for two days.

JILL M. CUTTER, RPR  
(513) 785-6596

1 we didn't want to subpoena a bunch of witnesses for  
2 today and tomorrow. We would anticipate having some  
3 witnesses on L and M specifically; probably more -- I'm  
4 sorry, L.

5 THE COURT: Being the right to a jury trial?

6 MS. COOK-REICH: Yes, Your Honor.

7 MS. COOK-REICH: And M. L and M.

8 THE COURT: All right.

9 MS. COOK-REICH: And we anticipated doing that --  
10 those two tomorrow in conjunction.

09:26AM

11 THE COURT: Okay. Mr. Eichel?

12 MR. EICHEL: May it please the Court, in light of  
13 the statement that they wish to introduce evidence on,  
14 on G, the pretrial identification, motion to suppress  
15 pretrial identification and trial identification, in  
16 light of the State's response that we have already  
17 filed, we would object to any hearing on this matter  
18 because the trial court is limited on this remand to  
19 the resentencing and this motion goes to things that  
20 happened at trial, things that should have happened  
21 before the trial in 1984. Res judicata and the law of  
22 the case, the conviction being affirmed in 1988 would  
23 preclude this trial court from having any jurisdiction  
24 over acting in derogation to that conviction. This was  
25 trial testimony that was admitted without objection.

09:27AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 There was no motion to suppress, no evidentiary hearing  
2 at the time that it should have been had in 1984.

3 THE COURT: And refresh my recollection. I tried  
4 to go back and read through Davis 1, 2, 3 and 4 and  
5 then the federal cases, and I don't recall seeing that  
6 this was ever an issue that was an assignment of error  
7 during the appeal.

8 MR. EICHEL: No, it was not. But the law res  
9 judicata prohibits further litigation after a  
10 conviction is affirmed. Res judicata prohibits things  
11 that could have been or -- were raised or could have  
12 been raised at the proper time. A litigant is given  
13 the proper opportunity before trial to file a motion to  
14 suppress. If they didn't, that is res judicata.

09:28AM

15 THE COURT: Okay. All right.

16 MS. COOK-REICH: Response, Your Honor. Relative  
17 to having a hearing on this, the defense would indicate  
18 that even the prosecutor has recognized its need to  
19 still prove the aggravated murder charge as part of the  
20 mitigation hearing. Just as you would in a normal  
21 death penalty case you have to resubmit evidence,  
22 witnesses' statements, testimony, as well as  
23 photographs. And the fact that the prosecutor has, in  
24 their discovery response, listed -- I lost track of the  
25 numbers -- but listed at least 25 witnesses -- maybe

09:28AM

JILL M. CUTTER, RPR  
(513) 785-6596



1 they just used those numbers -- as potential witnesses  
2 for the mitigation phase going towards the aggravated  
3 murder, and recognized by the prosecutor themselves  
4 that they believe they have to present this evidence.

5 We would also indicate that if this Court says we  
6 are not allowed to have witnesses on this or no  
7 argument, then it would file that we would be reduced  
8 to any time that something is already admitted into  
9 this particular mitigation trial, reduced to only the  
10 objections or issues raised by the prior trial counsel,  
11 and so if something is said we are not allowed to  
12 object to it unless it was objected to in the first  
13 trial and that is why we are requesting this.

09:29AM

14 It would be just like when Davis was being  
15 resentenced the second time by the second three-judge  
16 panel indicating they can't produce additional evidence  
17 on the matter.

18 THE COURT: well, mitigation evidence. I mean,  
19 that is the key of the holding I believe in the Davis  
20 vs. Coyle and Skipper, is that the defense is to have  
21 wide latitude in presenting additional mitigation  
22 evidence even if it was not evidence that was presented  
23 at the original hearing that you should be allowed to  
24 do that. But why would issues that involve the  
25 determination of guilt or innocence which has been

09:29AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 determined and has been upheld on appeal, why would  
2 that be an issue that this Court would take up at this  
3 time?

4 MS. COOK-REICH: The State has recognized their  
5 need to prove that aggravated murder as part of the  
6 mitigation -- what I would also say to the Court is  
7 part of the mitigating factors enumerated by the  
8 statute are the facts and circumstances of the offense.

9 THE COURT: To the extent that they are  
10 mitigating, right.

09:30AM

11 MS. COOK-REICH: Yes, Your Honor.

12 THE COURT: Mr. Porter, would you like to be heard  
13 on it as well?

14 MR. PORTER: I am a big movie fan.

15 THE COURT: Nice to know.

16 MR. PORTER: And one of the movies I have watched  
17 repeatedly is Ground Hog Day. I don't know whether the  
18 Court has seen that one or not.

19 THE COURT: Yes, I have. Thank you.

20 MR. PORTER: And it involves an individual that  
21 repeatedly wakes up and repeats the day after day after  
22 day 'til he gets his life right. That is really what  
23 is going on here, is that when this case was back on  
24 remand, there was an issue of what evidence Mr. Davis  
25 could present. And if you look at the concurring

09:31AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 opinion in the 6th Circuit, it isn't a Skipper issue,  
2 but it is --

3 THE COURT: It's a due process issue.

4 MR. PORTER: -- of being able to challenge the  
5 evidence that the prosecution puts forward.

6 THE COURT: Specifically the concurrence thoughts  
7 about the future dangerousness issue.

8 MR. PORTER: Future dangerousness and evidence of  
9 that sort.

10 THE COURT: Okay.

09:31AM

11 MR. PORTER: I have some additional arguments  
12 because I believe this is an important issue. The  
13 State has suggested to this Court that this matter is  
14 governed by the law of the case. And they site the  
15 Court to Nolan -- and just a minute if I could, Your  
16 Honor -- and Nolan talks about that it is a law of  
17 convenience. It is not something that binds this  
18 Court.

19 THE COURT: All right.

20 MR. PORTER: When you are looking at -- I suggest  
21 when you are interpreting the 6th Circuit's decision,  
22 you should look at what binds this Court pursuant not  
23 to state law, but to federal law. And 6th Circuit law  
24 is very clear and I am fumbling through this and not  
25 finding the case I want, but 6th Circuit law is very

09:32AM

JILL M. CUTTER, RPR  
(513) 785-6596



1 clear that the only thing that binds this Court  
2 pursuant to the 6th Circuit mandate is any issue that  
3 was decided by the 6th Circuit. The issue of whether  
4 there was improper identification was never decided by  
5 the 6th Circuit.

6 In fact, if you look at the 6th Circuit opinion,  
7 Your Honor, it leaves open the fact that a lot of the  
8 issues that Red raised are going to be relitigated.  
9 Red raised the issue that he should have been able to  
10 withdraw his jury plea the first time around. The 6th  
11 Circuit says, we know you are going to relitigate that  
12 when it goes back down. The 6th Circuit said you  
13 raised an issue about whether the trial judges  
14 committed error by not appointing new experts the last  
15 time around. We know you are going to litigate that  
16 when it goes back down.

17 I suggest to the Court that even looking at the  
18 law of the 6th Circuit and looking at the opinion  
19 itself, it does not limit the Court on this issue. I  
20 would suggest the Court cannot consider evidence for  
21 purposes of sentencing Red if that evidence violates  
22 the Fifth Amendment and there was an unduly suggested  
23 procedure.

24 THE COURT: Well, I appreciate that. I am going  
25 to tell you at this point in time where I am at on the

JILL M. CUTTER, RPR  
(513) 785-6596

1 issue, but then I am going to tell you how I think we  
2 ought to proceed. And this is not to be interpreted as  
3 a ruling on this motion at this point in time, but I am  
4 going to tell you that as I reviewed the motions and at  
5 first blush my feeling is that we are not here in  
6 December to retry the case. Okay. We are here for a  
7 resentencing hearing. That the guilt of Mr. Davis has  
8 been established at the initial trial and has been  
9 upheld on appeal by the Ohio Supreme Court. That this  
10 case was remanded to this Court because the earlier  
11 three-judge panel was deemed to have unduly restricted  
12 the defense's ability to present evidence in mitigation  
13 pertinent to whether or not the death penalty or a life  
14 sentence should be imposed.

09:35AM

15 Now, what I am going to -- however, I am not  
16 ruling on that at this time. I am just telling you  
17 that that is where I believe we are at on this. What I  
18 would propose, though, is that if you have witnesses  
19 here that you proceed with the witnesses, that it could  
20 be interpreted, at a minimum, as a proffer. And in the  
21 event that the Court ultimately determines, Mr. Porter,  
22 that you are correct in being able to present these  
23 issues, then the evidence will have been presented and  
24 the Court would obviously be able to consider it, but  
25 at a minimum it would be proffered. It would be there

09:36AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 for a subsequent Court to review in the event that this  
2 Court determines that it is not appropriate to be  
3 relitigated. So we will allow that testimony, but it  
4 is going to be -- just because I am not allowing the  
5 testimony I don't want you to think that I am making  
6 any determination as to whether or not it would  
7 ultimately be admissible at this point in time at the  
8 subsequent resentencing hearing. All right.

9 MR. EICHEL: The Court will note our objection to  
10 that procedure.

09:37AM

11 MR. OSTER: Obviously the State would like to make  
12 the objection, you know, the doctrine of res judicata  
13 says from raising and litigating, even raising the  
14 issue should be barred by res judicata. It is a public  
15 policy that dictates that there should be an end to  
16 this litigation. It is a rule of fundamental and  
17 substantial justice of public policy and private  
18 speech. That is what res judicata is. It should be  
19 enforced by the Court. We would object to that citing,  
20 State vs. Szefurk, 77, Ohio State 3d. 98, which talks  
21 about res judicata, public policy and why there needs  
22 to be an end to this litigation and in the State's  
23 opinion because there is a final judgment that has been  
24 affirmed by the Ohio Supreme Court and the 6th Circuit  
25 has affirmed his conviction, the State would object to

09:38AM

JILL M. CUTTER, RPR  
(513) 785-6596



1 it even being raised much less litigated in this type  
2 of proffer.

3 MR. PORTER: I would like to respond to the  
4 citations. First is, two of the cases that they site  
5 to involve re-raising issues or raising issues in  
6 post-conviction that could have been raised on direct  
7 appeal, but they have nothing to do here unless I am  
8 missing something. I think this is a de novo hearing  
9 and he is entitled to a new hearing. What issues of res  
10 judicata have to do with post-conviction confuse me or  
11 I just don't understand.

09:39AM

12 The other two cases are real troublesome in that  
13 both of the cases, the Ohio Supreme Court case and the  
14 other case, involves a situation -- the U.S. Supreme  
15 Court case -- involves a situation where an individual  
16 sued or brought a complaint. Lost. Chose not to  
17 appeal. And then reinstituted the litigation. That is  
18 certainly not the situation here. Red won. There is  
19 nothing. This would have been -- that precedent would  
20 only be applicable if Red had lost in the 6th Circuit  
21 and then he was going back through a second time. Red  
22 won, which distinguishes the Ohio Supreme Court and  
23 distinguishes the United States Supreme Court, the case  
24 that they cite to.

09:40AM

25 THE COURT: All right. Well, as I indicated, I am

JILL M. CUTTER, RPR  
(513) 785-6596

1 going to allow them to present that, but I am not  
2 indicating at this point in time that I agree, Mr.  
3 Porter, with your motion. So we will allow that  
4 testimony to be presented today. The Court will  
5 consider it, as I stated, at a minimum as a proffer for  
6 purposes of preserving the record, but in the event  
7 that the Court would determine that you are correct,  
8 that evidence is of record.

9 what about the evidence on the jury trial issue  
10 and seeking the death penalty, those are both tomorrow?

09:41AM

11 MS. COOK-REICH: Yes, Your Honor.

12 THE COURT: How many witnesses do you have here on  
13 this pretrial and trial identification issue?

14 MS. COOK-REICH: Seven, Your Honor.

15 THE COURT: Seven witnesses? Okay. Now, are  
16 these -- I mean, are these fact witnesses from the  
17 original trial? Is that what this is?

18 MS. COOK-REICH: One is not. And actually she is  
19 -- one goes to the motion for G, but also has some  
20 overlap relative to the motions on the disclosure of  
21 the file.

09:42AM

22 THE COURT: Okay. And I am going to indicate I am  
23 allowing this to be presented also just in an abundance  
24 of caution just in the event that there would be  
25 anything presented that could arguably be considered

JILL M. CUTTER, RPR  
(513) 785-6596

1 mitigating evidence regarding the nature and  
2 circumstances of the offense at a subsequent hearing.  
3 And I think that the proffer would provide the best  
4 source for the Court to be able to make that  
5 determination later at the resentencing hearing and  
6 determine whether there was anything here that could be  
7 argued as being relevant to mitigation in this case.

8 So with that being said, do we want to go ahead  
9 and proceed with those witnesses at this time?

10 MR. EICHEL: Your Honor, we will object on the  
11 same grounds without reiterating.

09:42AM

12 THE COURT: I understand.

13 MR. EICHEL: And the jury trial matter is again a  
14 matter of law. I don't understand why we need any  
15 evidence on that issue. It's a matter of law. That's  
16 enough said.

17 THE COURT: Right. Okay. All right.

18 MR. EICHEL: Well, there is one other thing. I  
19 don't understand why we don't get reciprocal discovery  
20 in this case. They have named -- or they have not  
21 named a witness that they say was not a fact witness at  
22 trial. We don't know who that is.

09:43AM

23 THE COURT: Well, you are going to find out today  
24 well in advance of the resentencing hearing. You know,  
25 my understanding is that this is for purposes of this

JILL M. CUTTER, RPR  
(513) 785-6596



1 motion. This is not necessarily testimony that just  
2 because it is presented today at this Court, that it is  
3 something that would be considered by the ultimate  
4 sentencing body in this case, whether it be a  
5 three-judge panel or a jury.

6 MS. COOK-REICH: While we are on that particular  
7 issue of reciprocal discovery, defense has taken the  
8 position that we are not required to provide reciprocal  
9 discovery. Our limited demand for discovery, which is  
10 motion H, which is what we had it labeled as, as the  
11 Judge also had it labeled, is very specific into the  
12 demand for discovery we are requesting. And it is our  
13 position that the request we have placed within the  
14 record does not require us to have reciprocal  
15 discovery. And I make that statement based upon the  
16 repeated filings by the prosecutor using the words, we  
17 are assuming that the defense is going to provide  
18 limited or discovery reciprocal and, in fact, we are  
19 not.

09:44AM

20 THE COURT: Okay. Well, we will address that  
21 issue separately. Are you prepared to call your first  
22 witness?

09:44AM

23 MS. COOK-REICH: Mr. Porter wishes to address one  
24 issue.

25 MR. PORTER: We think pursuant to Brady vs.

JILL M. CUTTER, RPR  
(513) 785-6596

1        Maryland and to be properly prepared for this hearing  
2        that we are entitled to all evidence that the  
3        prosecution has; that they used an unduly suggestive  
4        pretrial lineup procedure. What happened is -- or at  
5        least what I think happened is, at trial defense  
6        counsel tripped over the fact that with two of the  
7        witnesses, that the police were only using one photo  
8        for purposes of a lineup. I think we can all agree  
9        that that is improper.

10        For each of those witnesses for us to be prepared  
11        for today's hearing we are entitled to know which  
12        witnesses they only used one photograph for.

09:45AM

13        THE COURT: All right. What is it that you are  
14        seeking to ultimately gain? You are seeking to, for  
15        purposes of the sentencing hearing, having the trial  
16        identifications and pretrial identifications  
17        suppressed?

18        MR. PORTER: So the three-judge panel or the jury  
19        cannot consider them.

20        THE COURT: How does that not undermine the  
21        finding of guilt that has been sustained by those  
22        courts?

09:46AM

23        MR. PORTER: Because you have to consider that  
24        evidence for purpose of sentencing.

25        THE COURT: Right, but the guilt has been

JILL M. CUTTER, RPR  
(513) 785-6596

1 established.

2 MR. PORTER: I understand that, but you cannot  
3 turn around and use the three-judge panel. The jury  
4 cannot turn around and use that evidence for purposes  
5 of sentencing.

6 THE COURT: Well, I mean what the three-judge  
7 panel or the jury is going to be looking at is the  
8 aggravating circumstance and then the mitigating  
9 factors that you are going to present and they can look  
10 at the nature and circumstances of the offense to the  
11 extent that they are trying to determine whether there  
12 is any mitigating factors present that you are going to  
13 offer, but as far as actually seeking to suppress  
14 pretrial and trial identifications on a final  
15 conviction, I mean that is not something that we are  
16 going to be doing here.

09:47AM

17 MR. PORTER: And I understand that, but our  
18 position is we aren't looking to upset the verdict. We  
19 are looking to limit the evidence that can be used for  
20 purposes of sentencing. And to that effect, we are  
21 entitled pursuant to Brady to any evidence the State  
22 has that they were using one lineup photographs. And  
23 for us to do this hearing, having to call people blind  
24 because we haven't gotten that evidence, is impossible.

09:47AM

25 THE COURT: So you are indicating that you are not

JILL M. CUTTER, RPR  
(513) 785-6596



1 prepared at this time to call these witnesses? Is that  
2 what you are saying?

3 MR. PORTER: We have the witnesses here, but we  
4 are certainly entitled to that evidence the State has  
5 prior to having to call these witnesses.

6 THE COURT: All right. All right.

7 MR. OSTER: Your Honor, if I may, it seems as what  
8 the defense is trying to do is raise some sort of  
9 residual doubt issue. Residual doubt does not belong  
10 in the mitigation hearing anymore. If what the  
11 defense's strategy is to do is to try take away  
12 identifications that were made at a trial that have  
13 been affirmed that that conviction is final.

09:48AM

14 The defense said that Mr. Davis won. Well, Mr.  
15 Davis won as to a mitigation hearing. His conviction,  
16 Mr. Davis lost. Mr. Davis is guilty of the murder  
17 charge. Those --

18 THE COURT: And the specification.

19 MR. OSTER: And the specification, and he has lost  
20 to that issue, so if you are trying to go under a  
21 residual doubt, I think the Ohio Supreme Court is clear  
22 as to what residual doubt, that it does not play into a  
23 mitigation hearing.

09:48AM

24 MR. PORTER: And we are certainly not arguing  
25 residual doubt. What we are saying is, the sentence --

JILL M. CUTTER, RPR  
(513) 785-6596

1 or whoever it may be cannot rely upon testimony for  
2 purposes of sentencing that was obtained in violation  
3 of the Fifth Amendment.

4 THE COURT: Okay. But there is no -- I mean, this  
5 is testimony that was presented at the original trial  
6 that was considered by the original three-judge panel  
7 that made a finding of guilt that has subsequently been  
8 affirmed by multiple levels of appellate courts,  
9 including the Ohio Supreme Court.

10 You are saying the evidence that that three-judge  
11 panel considered on the guilt issue and that's been  
12 sustained is not going to be -- you are seeking to  
13 suppress it for purposes of the mitigation hearing?

09:49AM

14 MR. PORTER: Yes, Your Honor.

15 THE COURT: So it is not so much -- I mean, is  
16 your argument that it doesn't pertain to the  
17 aggravating circumstance? Because I mean, normally,  
18 there is going to be at least some restriction on what  
19 the State is going to be presenting at the mitigation  
20 hearing because the facts and circumstances of the  
21 offense is not an aggravating circumstance. So I  
22 understand that. And I understand that that is not  
23 something that they are going to hear, but that is not  
24 like suppressing. I mean, I think what you're -- what  
25 I am interested in hearing and the reason that I am

09:50AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 willing to allow you to proffer this testimony is to  
2 determine in an abundance of caution given the ruling  
3 in the Davis vs. Coyle case, given the fact that we are  
4 25 years down the pike doing this, in an abundance of  
5 caution I want to make sure that if there is any  
6 mitigating factor present as a result of the nature and  
7 circumstances of the case, that something that you  
8 would be able to present that you have the opportunity  
9 to flush that out. Because what I am not going to do  
10 in this case is unduly restrict you in presenting  
11 mitigation.

09:51AM

12 Now, of course, it still has to be relevant  
13 mitigation. We still have to follow the law in those  
14 respects. But I guess what I am suggesting to you, Mr.  
15 Porter, is I am not going to open up -- order the  
16 prosecution to open up their file to present items to  
17 you in preparation for this testimony today that merely  
18 goes to, I guess, the reliability of the lineup  
19 procedure, all of that. How is that a mitigating  
20 circumstance -- or mitigating factor that relates to  
21 the character or the background of this defendant?

09:52AM

22 If you can present to me or establish to me that  
23 it is a mitigating factor in the case, you know, I will  
24 listen that, but the fact that a lineup procedure or an  
25 identification -- I mean, that issue has been decided.

JILL M. CUTTER, RPR  
(513) 785-6596



1           MR. PORTER: Let me go at it a different way. The  
2           State has listed these eyewitnesses in discovery. I  
3           assume they did it for some reason other than just to  
4           make us run around trying to find the witnesses. I am  
5           assuming there is a good faith basis they intend to  
6           call these people.

7           MR. EICHEL: Your Honor, our intent is listing  
8           everything we know in discovery is at issue. We listed  
9           everything we know, whether we are going to use it or  
10          not. It is our understanding of the discovery rules  
11          that we have to give them everything --

09:53AM

12          THE COURT: Right. And that is the standard.

13          MR. EICHEL: -- in the nature of witnesses. We  
14          did.

15          THE COURT: All right. Now, is this -- your  
16          request right now for this information, does that  
17          correspond to any of the identified motions? Are we  
18          arguing another motion?

19          MR. PORTER: No, we are arguing the same motion.  
20          We filed a motion to suppress based upon pretrial  
21          identification unduly suggestive. There has never been  
22          any evidence -- the court has taken the position --  
23          this should have been raised under appeal or at least  
24          that is the prosecution's basis. It is really hard to  
25          raise those issues on direct appeal unless the evidence

09:53AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 was ever put in the record.

2 THE COURT: He has had 24 years of appeals to be  
3 able to raise that issue. And I don't think the first  
4 place that the Court should be considering whether the  
5 pretrial and trial identifications in this matter that  
6 occurred back in the early eighties, is appropriate or  
7 not as today. I mean, there was ample opportunity to  
8 have raised that. It has not been raised. It was not  
9 objected to at trial. It wasn't raised on appeal to  
10 address it for purposes of plain error or anything like  
11 that. It has not been raised in any of the  
12 post-conviction proceedings.

13 MR. PORTER: That is incorrect.

14 THE COURT: Which case? I looked through the  
15 cases. I didn't see where it was raised.

16 MR. PORTER: It was at least raised in the federal  
17 habeas proceedings.

18 THE COURT: And pardon me if I didn't see that,  
19 but what was the result?

20 MR. PORTER: It was raised in terms of appellate  
21 counsel had failed to raise the issue --

22 THE COURT: Ineffective assistance? We're not  
23 back here with the conviction having been reversed due  
24 to ineffective assistance of counsel, are we?

25 MR. PORTER: We are not.

JILL M. CUTTER, RPR  
(513) 785-6596

1 THE COURT: All right. I am going to overrule  
2 your request. Let's call your witnesses.

3 ALLISON BAKER

4 Having been first duly sworn, was examined and testified under  
5 oath as follows:

6 DIRECT EXAMINATION

7 BY MR. PORTER:

8 Q. Would you state your name for the record, please?

9 A. Allison Baker.

10 Q. And spell your last name for the court reporter,  
11 please.

09:56AM

12 A. B-A-K-E-R.

13 Q. And your address?

14 A. [REDACTED]

15 Q. And are you currently employed?

16 A. Yes.

17 Q. And where are you employed?

18 A. City of Hamilton Police Department.

19 Q. And what is your job title?

20 A. I am the police records supervisor.

09:57AM

21 Q. And how long have you held that position?

22 A. Four years.

23 Q. What does that job entail?

24 A. I supervise seven clerks in the office. Take care  
25 of monthly reports to send to the state and FBI, and we

JILL M. CUTTER, RPR  
(513) 785-6596



1 catalog any paperwork that comes into the office.

2 Q. I am going to show you --

3 MR. PORTER: Court's permission to approach the  
4 witness, Your Honor?

5 THE COURT: Permission granted.

6 Q. I will show you what is marked as defendant's  
7 Exhibit A. Have you seen that previously?

8 A. Yes.

9 Q. And could you tell the Judge what that is?

10 A. This is a witness information form, subpoena, that  
11 I received on Monday to appear here in court today.

09:58AM

12 Q. And did it request you bring specific items?

13 A. Yes, it did. It requested I bring pretrial  
14 information.

15 Q. And how did you physically receive that subpoena?

16 A. It was placed in the bin at our front desk area.  
17 We have a central records designated bin and all of the  
18 paperwork is placed in there. And the desk officer received  
19 it and placed it in our bin.

20 Q. Did you make an effort to comply with the  
21 subpoena?

09:59AM

22 A. Yes, I did.

23 Q. Could you tell Judge Nastoff what you did?

24 A. I contacted my immediate supervisor and we went to  
25 the property room and searched for any records from this

JILL M. CUTTER, RPR  
(513) 785-6596

1 incident.

2 Q. Were you able to find any?

3 A. No, sir.

4 Q. What sort of filing system do you have there?

5 A. Right now or then?

6 MR. EICHEL: I don't know the point of this. This  
7 is a discovery matter. We have already established  
8 there is -- there is no records there. Okay.

9 THE COURT: Well, by her last answer you are  
10 saying?

09:59AM

11 MR. EICHEL: I object to the calling of all police  
12 personnel for discovery matters. That is my basic  
13 objection.

14 THE COURT: Okay.

15 MR. PORTER: It is pursuant to the U.S. Supreme  
16 Court precedent assuming we are here on a motion to  
17 suppress.

18 THE COURT: We are not here on a motion to  
19 suppress.

20 MR. PORTER: We're here on --

10:00AM

21 THE COURT: Well, I know you have styled this as a  
22 motion to suppress pretrial and trial identifications.  
23 What I have indicated is that is something that is  
24 properly raised during the trial, prior to trial, not  
25 24 years after trial, and not after all of the appeals

JILL M. CUTTER, RPR  
(513) 785-6596

1 have been exhausted and the conviction has been  
2 affirmed by the highest court in the state.

3 I mean, to the extent that you have something that  
4 goes -- that can be considered a mitigating factor that  
5 can be presented at a sentencing hearing, I am trying  
6 to give you as much leeway as possible. But counsel, I  
7 mean, this is a motion leading up to a resentencing  
8 hearing. We are not going to be talking about whether  
9 we are suppressing an identification. I mean, the  
10 identification has been made and it is a part of the  
11 finding of guilt. The three-judge panel -- the things  
12 that the three-judge panel or the jury are going to be  
13 reviewing, are going to be the matters that -- and we  
14 will have a separate hearing to determine this. You  
15 will have an opportunity to object to items of evidence  
16 that are presented. But it is going to be matters that  
17 are relevant to the aggravating circumstance and your  
18 mitigation.

10:01AM

19 MR. PORTER: Could I have a minute to confer with  
20 co-counsel, Your Honor?

10:01AM

21 THE COURT: Yes.

22 (Defense Counsel confer off the record.)

23 Q. (By Mr. Porter) I don't mean to repeat your  
24 answers, ma'am. You said you looked and you found no records?

25 A. Correct.

JILL M. CUTTER, RPR  
(513) 785-6596



1           Q. Do you have a record retention schedule regarding  
2 these records?

3           A. We do at present. In 1987, there was a flood in  
4 the room that the records were kept. And what I understand,  
5 quite a bit of information was destroyed.

6           Q. It's my understanding that in 1986 you started to  
7 microfilm or microfiche, I get those terms confused, records.

8           A. Yes.

9           Q. Did you look to see if these records are  
10 microfilmed or microfiched?

10:02AM

11           A. Yes. At pretrial we did not get into central  
12 records. We would not have access to that information.

13           Q. It's my understanding that the individual officers  
14 often kept their separate files for their own purposes  
15 regarding investigations they did?

16           A. I have no idea what they kept, sir.

17           Q. Did you check with any of the officers that had  
18 been assigned to this case or detectives that were around back  
19 then?

20           A. From what I understand, the people that were there  
21 in 1983 have retired.

10:03AM

22           MR. PORTER: Let me check with counsel for one  
23 minute, Your Honor.

24           THE COURT: All right.

25           (Defense counsel confer off-the-record.)

JILL M. CUTTER, RPR  
(513) 785-6596

1 MR. PORTER: We have no further questions.

2 MR. EICHEL: No questions for this witness, Your  
3 Honor.

4 THE COURT: You may be excused. Thank you.

5 MONA BRYANT

6 Having been first duly sworn, was examined and testified under  
7 oath as follows:

8 DIRECT EXAMINATION

9 BY MR. PORTER:

10 Q. Can you state your name for the record, please?

10:05AM

11 A. Mona Bryant.

12 Q. I am sorry. I didn't hear.

13 A. Mona Bryant.

14 Q. would you spell your last name?

15 A. B-R-Y-A-N-T.

16 Q. And your address?

17 A. [REDACTED] Middletown, Ohio. 45044.

18 Q. All right. And I understand you contacted --

19 A. Melynda.

20 Q. -- about testifying today?

10:05AM

21 A. Yes, I did.

22 Q. And you are --

23 A. I told her I was on medication for my nerves. I  
24 have severe anxiety attacks, and that I really can't remember  
25 what happened that day.

JILL M. CUTTER, RPR  
(513) 785-6596

1 Q. I will try to make it short and try to make it as  
2 stress free as possible.

3 A. Okay.

4 Q. Are you currently employed?

5 A. No, I am not.

6 Q. And you are wearing glasses today?

7 A. Yes, I am.

8 Q. Are they to see things clear? I'm sorry. Not  
9 clear. Distant?

10 A. Far away.

10:06AM

11 Q. And back in 1983 were you wearing glasses?

12 A. No, I was not.

13 THE COURT: You may want to assist the Court in  
14 identifying who this witness is and what she knows.  
15 I'm not sure who we are talking to and what any of your  
16 questions are relevant to.

17 MR. PORTER: I was going to get to that in a  
18 minute, Your Honor.

19 THE COURT: I guess it maybe helpful if you  
20 establish some foundation so that I have some idea  
21 where we are at and where we are going.

10:06AM

22 Q. Back when this case was initially tried, were you  
23 called as a witness?

24 A. I am quite sure I was.

25 Q. All right. And did you testify regarding some

JILL M. CUTTER, RPR  
(513) 785-6596



1 events that you had seen around the shooting in this case?

2 A. I probably did, but I cannot remember what was  
3 said. I blocked all of that out of my memory. I do not  
4 remember.

5 Q. Was your -- can you remember anything at all then?

6 A. Not very much. Not that happened 24 years ago.  
7 Not very much.

8 Q. Were you at the --

9 A. I was at the club that night.

10 Q. You need tell the Judge what club that was.

10:07AM

11 A. It was the Legion in Hamilton, Ohio.

12 Q. Can you -- did you have any contact with the  
13 victim in this case on the day of the shooting?

14 A. Yes, I did. She was a friend of mine.

15 Q. All right. And her name was for the record?

16 A. Suzette Butler.

17 Q. Did you see a fellow that you know by the name of  
18 Red or Von Davis on that day?

19 A. I did see him in the club.

20 Q. And did you see him with the victim on that day?

10:07AM

21 A. I can't testify to that. I can't -- I cannot  
22 remember seeing them together at all.

23 Q. Was there some point that you looked outside and  
24 saw an argument?

25 A. I might have, but I can't remember. Like I said,

JILL M. CUTTER, RPR  
(513) 785-6596

1 I cannot remember exactly what happened and how the events  
2 happened that day. What took place first I cannot remember.

3 Q. To the best of your recollection when you  
4 testified previously, is that still accurate?

5 A. I wouldn't say that was accurate. Because I can't  
6 say exactly what I said back then. Because it's been -- I  
7 will be honest with you. I told her I cannot remember.

8 Q. Did you have any contact with the investigating  
9 officers after the shooting?

10 A. Not that I know of.

10:08AM

11 Q. All right. I would like to show you Exhibit 2.

12 MR. EICHEL: I would like for the record to  
13 reflect, this was a joint exhibit at the trial in 1984.  
14 It is the statement of Mona Aldridge.

15 THE COURT: This is Mona Bryant. Was she formerly  
16 Mona Aldridge?

17 THE WITNESS: Yes, I was formerly Mona Aldridge.

18 THE COURT: Thank you for that clarification.

19 MR. EICHEL: As it reflects this was a pretrial  
20 statement given to defense at trial and it's been in  
21 their possession for the last 24 years.

10:09AM

22 THE COURT: That's fine. You may proceed.

23 MR. PORTER: I am going to have it marked as  
24 Defendant's Exhibit B today. Court's permission to  
25 approach the witness for purposes of showing her an

JILL M. CUTTER, RPR  
(513) 785-6596

1 exhibit?

2 THE COURT: You may.

3 Q. (By Mr. Porter) Can you take a look at that?

4 A. Some of it I do remember. I do remember seeing  
5 her outside, but some of the statements I do not remember  
6 making at all.

7 Q. I am sorry. Could you please repeat that for the  
8 record?

9 A. I said some of the statements I did -- I can  
10 remember saying; that I was at the Legion with her. But some  
11 of these statements I do not remember at all saying. And I  
12 signed it.

10:10AM

13 Q. Let me back up for a minute. The Judge is going  
14 to require me to ask a couple of questions first. Have you  
15 ever seen Defendant's Exhibit B previously?

16 A. I probably have.

17 Q. Okay. Is that your -- there is a signature --

18 A. That is my signature.

19 Q. Okay.

20 MR. PORTER: Could I again approach the witness  
21 just for looking at what I --

10:11AM

22 THE COURT: Go ahead.

23 Q. (By Mr. Porter) In the lower right-hand corner of  
24 the document there is a number. Do you see that?

25 A. 608?

JILL M. CUTTER, RPR  
(513) 785-6596



1 Q. Right. Do you know to what the 608 refers?

2 A. No, I do not.

3 Q. Okay. Can you remember giving that statement?

4 A. Not really. Like I said, that night when that  
5 happened, I was drinking, so I can't remember exactly what I  
6 said that night.

7 Q. Okay. How much had you been drinking that night?

8 A. Oh, quite a lot.

9 MR. OSTER: Object.

10 THE COURT: Sustain the objection.

10:12AM

11 MR. OSTER: I thought this was supposed to go  
12 toward identification for possibly a proffer as to if  
13 she was shown pictures, not her statement or a fishing  
14 expedition or anything to rehash the trial.

15 THE COURT: Mr. Porter, I am struggling to see how  
16 this pertains to anything that is going to be relevant  
17 at the resentencing hearing. This is all, as far as I  
18 can see, issues where you are attempting to  
19 collaterally attack the conviction that has been  
20 sustained and affirmed by the Ohio Supreme Court  
21 previously.

10:12AM

22 MR. PORTER: Well, if the witness had been  
23 drinking on the night in question, that certainly would  
24 be relevant mitigating evidence.

25 THE COURT: These are all issues that would have

JILL M. CUTTER, RPR  
(513) 785-6596

1        been ferreted out at trial, at a motion prior to trial  
2        that would have been issued. I just don't see any  
3        vehicle or any way that this is -- I mean, believe me,  
4        I am trying to give you as broad -- I am trying to be  
5        as lenient as possible in the event that there is  
6        something here that could arguably be used at  
7        resentencing, but going into undermining  
8        identifications that -- I mean, all of that is just an  
9        attempt to undermine the conviction or to argue a  
10       residual doubt issue or something along those lines. I  
11       just don't see how it relates to any mitigating factor  
12       involving this defendant, his background or a  
13       mitigating aspect of the nature and circumstances of  
14       the case. That is -- and that is what was represented  
15       is that I have to look at the nature and circumstances  
16       of the case as a potential mitigating factor. I am  
17       just waiting to see --

10:13AM

18                MR. PORTER: The State is going to have to, I  
19       assume, re-prove part of their case. I assume they are  
20       going to be calling some witnesses. It sounds like the  
21       Court is saying that the State is not going to be  
22       permitted to call any witnesses. And if so, then maybe  
23       I can understand the Court's position.

10:14AM

24                THE COURT: well --

25                MR. PORTER: But if a witness is going to be

JILL M. CUTTER, RPR  
(513) 785-6596

1 called by the State, whose testimony is a product of a  
2 Fifth Amendment violation, that certainly is relevant  
3 to the proceedings.

4 THE COURT: I'm going to sustain that objection.

5 MR. OSTER: Thank you, Your Honor.

6 Q. (By Mr. Porter) Can you remember where you gave  
7 the -- where you were when you gave the statement?

8 A. No, I cannot. I cannot remember that night. I  
9 have blocked a lot of that memory out. I cannot remember  
10 exactly where I was.

10:14AM

11 Q. Can you remember if the police showed you any  
12 pictures?

13 A. I cannot recall that at all.

14 MR. PORTER: A moment to confer with counsel?

15 A. I told -- went to her office --

16 THE COURT: Ma'am, there is no question before you  
17 right now.

18 (Defense counsel confer off the record.)

19 MR. PORTER: We have no further questions, Your  
20 Honor.

10:15AM

21 MR. EICHEL: I have just a few.

22 CROSS-EXAMINATION

23 BY MR. EICHEL:

24 Q. It's Mrs. Bryant?

25 A. Yes, it is.

JILL M. CUTTER, RPR  
(513) 785-6596



1 Q. And your name was Mona Aldridge back in 1983?

2 A. Yes, it was.

3 Q. And you were a good friend of Suzette Butler, were  
4 you not?

5 A. Yes, I was.

6 Q. How long had you known her?

7 A. I had known the family all of my life. We grew up  
8 together.

9 Q. And growing up together as children and as adults  
10 you socialized with her?

10:16AM

11 A. Yes, I did.

12 Q. Live in the same neighborhood?

13 A. On and off. Once we got grown we all went our  
14 separate ways.

15 Q. Well, but you said you do recall that that night  
16 you were at the Legion?

17 A. Yes, I was.

18 Q. And Suzette was there?

19 A. Yes.

20 Q. And you said Mr. Davis was there?

10:16AM

21 A. Yes.

22 Q. Mr. Davis, what was he in relation to Suzette,  
23 that you remember from those days?

24 A. She was seeing him in them days, but I think they  
25 had broke up. The night we was at the Legion I think they had

JILL M. CUTTER, RPR  
(513) 785-6596

1 broke up.

2 Q. So you knew Mr. Davis through her?

3 A. Yes.

4 Q. And you socialized with him and her on occasion?

5 A. Probably on occasion I did.

6 Q. Okay. So you knew Mr. Davis' name through  
7 Suzette?

8 A. Mr. Davis, I knew his brother. I knew his family.  
9 Hamilton is a very -- it's a very small town, so people knew  
10 everybody in Hamilton back then.

10:17AM

11 Q. So it is fair to say --

12 A. It is fair to say I did know him.

13 Q. -- you knew Mr. Davis not quite as well you knew  
14 Suzette, but you knew him from the neighborhood, too?

15 A. Yeah, I have seen him.

16 Q. So you told -- would you have told the police you  
17 knew him, same thing you are telling me today?

18 A. I probably would have told the police that if they  
19 asked me that, did I know him.

20 Q. Was it even necessary for the police to show you  
21 some kind of a lineup for you to say Mr. Davis was the guy you  
22 saw that night?

10:17AM

23 MS. COOK-REICH: Object. Speculation.

24 MR. PORTER: We are going to object and certainly  
25 it's not her job or her role to say what is necessary

JILL M. CUTTER, RPR  
(513) 785-6596

1           for the police to do or not do.

2           MR. EICHEL: I will withdraw the question.

3           Q.    (By Mr. Eichel) Did you know Mr. Davis on sight?  
4    You knew what he looked like?

5           A.    Yes, I knew what he looked like.

6           Q.    And you could tell the police what he looked like?

7           A.    I don't know that.

8           THE COURT: Hold on one second. For the record,  
9    there is construction going on in the space above the  
10   courtroom. There has been some loud clattering during  
11   this line of questioning, so there has been a couple of  
12   interruptions I guess because of that. I just wanted  
13   to indicate that it isn't the conduct of counsel that  
14   is interrupting anything. All counsel are behaving  
15   appropriately, but there is a circumstance outside of  
16   our control that we are attempting to remedy as we  
17   speak. So I just wanted the record to understand why I  
18   kind of interrupted a couple of times. To the extent  
19   that you are able to proceed with the distraction, feel  
20   free to do so. If you feel that you can't, let me know  
21   and we will take a break.

10:18AM

10:19AM

22          MR. EICHEL: Thank you, Your Honor.

23          THE COURT: Same goes for the defense.

24          Q.    (By Mr. Eichel) What has been marked previously  
25   as Joint Exhibit 2, is now marked today as Defendant's Exhibit

JILL M. CUTTER, RPR  
(513) 785-6596



1 B, you said was your statement?

2 A. I can't remember making that statement. And if I  
3 did sign it, I am not going to testify that it was true  
4 because I can't remember what happened back then.

5 Q. Well, that is fair --

6 A. Now, I just can't remember.

7 Q. -- fair enough. But you did --

8 A. I did identify it back then.

9 Q. Right under your signature it says the date  
10 12-12-83. In the text, in the words of this, you identified a  
11 person named -- the word Red Davis is right there?

10:20AM

12 A. I know him as Red Davis.

13 Q. Okay. And throughout the rest of this, you refer  
14 to Red here, and Red here. Red had a gun in his hand it says  
15 right here. At the end, when Red was arguing with Suzette, he  
16 pointed the gun at her head.

17 A. I don't remember none of that.

18 Q. It said it --

19 MR. PORTER: I will object. The document speaks  
20 for itself. She already said she can't verify what is  
21 accurate in the document, Your Honor.

10:21AM

22 THE COURT: All right. But once again, I am going  
23 to indicate as we are going through this witness, all  
24 of these issues appear to be relevant only to  
25 credibility of a witness. That is an issue that would

JILL M. CUTTER, RPR  
(513) 785-6596

1 have been determined by the trier of fact in the  
2 original trial, not an issue for this Court 25 years  
3 post to be looking at. So I understand you are  
4 following up on questions that have been asked.

5 MR. EICHEL: Let me ask just one more question.

6 Q. (By Mr. Eichel) It wouldn't be unusual back then  
7 or even today to refer to the defendant here as Red?

8 A. No, it wouldn't be unusual. That is the name I  
9 knew of him.

10 MR. EICHEL: Thank you. No further questions.

10:21AM

11 REDIRECT EXAMINATION

12 BY MR. PORTER:

13 Q. The document that we have been referring to,  
14 ma'am, do you remember if you were the person that typed that?

15 A. No. I know I did not type that. Not at all. I  
16 didn't even have access to a typewriter back then.

17 Q. How far did you go in school?

18 A. 12th. I graduated from high school. I knew how  
19 to type, but I didn't have a typewriter.

20 Q. All right. The prosecutor asked you about the  
21 statement and went through the content of the statement with  
22 you. Do you remember if you read the statement prior to  
23 signing it?

10:22AM

24 A. Most likely I didn't. I will be honest. Most  
25 likely I didn't read the statement.

JILL M. CUTTER, RPR  
(513) 785-6596

1 MR. PORTER: I have no further questions, Your  
2 Honor.

3 THE COURT: Anything further, Mr. Eichel?

4 MR. EICHEL: Nothing further, Your Honor.

5 THE COURT: Ma'am, you can be excused. Thank you  
6 for coming in.

7 THE WITNESS: Do I have to stay here for the rest  
8 of the day?

9 THE COURT: No, you do not, ma'am. You are  
10 released. Ms. Cook-Reich is getting the next witness?

10:23AM

11 MR. PORTER: That is correct, Your Honor.

12 JODAWNA MCREARY

13 Having been first duly sworn, was examined and testified under  
14 oath as follows:

15 DIRECT EXAMINATION

16 BY MS. COOK-REICH:

17 Q. Ma'am, can you state your name for the record,  
18 please?

19 A. JoDawna McCreary.

20 Q. were you previously also known as JoDawna  
21 Southern?

10:24AM

22 A. Yes.

23 Q. Okay. And ma'am, can you state your address for  
24 the record, please?

25 A. [REDACTED] Cincinnati, Ohio.

JILL M. CUTTER, RPR  
(513) 785-6596



1 Q. Okay. And I apologize, I meant to have you spell  
2 your first and last name for the court reporter.

3 A. J-O D-A-W-A-N-A, M-C-C-R-E-A-R-Y.

4 Q. And, ma'am, did you previously testify at a trial  
5 in regards to State of Ohio vs. Von Clark Davis in 1983 or  
6 '84?

7 A. I was subpoenaed.

8 Q. Do you recall if you testified?

9 A. I didn't talk, so.

10 Q. You didn't talk at all?

10:25AM

11 A. No.

12 Q. Did you testify at any other prior hearing on Mr.  
13 Davis' case?

14 A. I talked with a detective at the police station,  
15 and that was it.

16 Q. Do you recall whether when you spoke with the  
17 police detective at the police station whether you were shown  
18 any photographs?

19 A. No, I wasn't.

20 Q. You were not shown any photographs?

10:25AM

21 A. No.

22 Q. Did you know Suzette Butler?

23 A. Yes, I did.

24 Q. Prior to that day?

25 A. Yes.

JILL M. CUTTER, RPR  
(513) 785-6596

1 Q. Did you know Mr. Davis prior to that day?

2 A. Yes, I did.

3 Q. Did you provide statements to the detective if you  
4 remember?

5 A. Yes, I did.

6 MR. EICHEL: Your Honor, I think those last  
7 questions end the matter.

8 THE COURT: Well --

9 MR. EICHEL: Object to further questioning on  
10 those.

10:25AM

11 THE COURT: Let me try to give some further  
12 guidance as to where I am at on this. Okay.  
13 Mitigating factors under 2929.04 (D), and these are the  
14 kind of things that I was trying to allow the defense  
15 to have some latitude so that we can see if there is  
16 anything pertinent to these things; whether the victim  
17 of the offense induced or facilitated it; whether it is  
18 unlikely that the offense would have been committed but  
19 for the fact that the offender was under duress,  
20 coercion, strong provocation. You know, any of these  
21 other factors that are listed under 2929.04(D) or under  
22 the catchall and the summary I have of various relevant  
23 mitigating factors that courts have addressed, family  
24 history, background, or family environment of the  
25 defendant, good character, favorable community

10:26AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 reputation, substance abuse issue, personality disorder  
2 low level of intelligence or mental retardation,  
3 remorse, assistance to cooperation with police, promise  
4 reformation or religious conversion, military service,  
5 victim's illegal activities have been addressed,  
6 employment, love and support of family members, good  
7 prison conduct, impact on a child, probability of no  
8 release from prison, health problems of a defendant,  
9 care of an elderly, you know, these are the kind of  
10 mitigating factors that we look at; not whether or not  
11 a procedure leading to an identification followed, you  
12 know, met certain requirements or not when that issue  
13 was never raised at trial. It was not something that  
14 was litigated at trial, it has never been litigated on  
15 appeal other than in the context of an ineffective  
16 assistance claim and to that extent, has not been found  
17 to have merit.

10:27AM

18 So, please, I am going to allow you to call  
19 witnesses, but the idea is that there is going to be  
20 something that pertains to some of these mitigating  
21 factors or something about the nature and circumstances  
22 of the offense that would be mitigating for this  
23 defendant.

10:28AM

24 MR. OSTER: If I may just briefly, I think  
25 possibly looking at the eyes of the witness that an

JILL M. CUTTER, RPR  
(513) 785-6596



1 exhibit may be laying on the witness table. I would  
2 like to have that removed.

3 THE COURT: That was from the previous witness?

4 MR. OSTER: Yes, Your Honor.

5 THE COURT: Prior exhibits are up here.

6 MR. EICHEL: For the record, after the testimony  
7 of the previous witness, I have no objection of that  
8 being admitted into evidence at this point.

9 THE COURT: For purposes of this hearing. All  
10 right. So with the Court's comments in mind you may  
11 proceed.

10:28AM

12 Q. (Ms. Cook-Reich) Ms. McCreary, how well did you  
13 know Red Davis?

14 A. I didn't know him that well. Not like that, no.  
15 Just knew of him.

16 Q. Knew of him.

17 A. And knew what he looked like.

18 Q. Okay.

19 A. And who his name was, what it is.

20 Q. Prior to that evening at the Legion had you seen  
21 him on more than one occasion?

10:29AM

22 A. Yes.

23 Q. Were you from the neighborhood of Hamilton where  
24 he was from?

25 A. Yes, uh-huh.

JILL M. CUTTER, RPR  
(513) 785-6596

1 Q. You knew him from the neighborhood?

2 A. I knew his parents and stuff.

3 Q. Okay.

4 A. His mom and his sister.

5 Q. And I apologize, when you say I knew them, you  
6 knew of them or you knew them?

7 A. I knew them.

8 Q. You were an acquaintance of them, friends with  
9 them?

10 A. Yes. Yes.

10:29AM

11 Q. And therefore, you were an acquaintance by  
12 relation to Von Clark Davis?

13 A. Well, I knew -- well, I just knew him. I knew who  
14 he was.

15 Q. Okay. And you weren't shown any photographs of  
16 him by any detective or any police officer?

17 A. No.

18 Q. Did you witness any other person be shown a  
19 photograph?

20 A. No.

10:30AM

21 Q. Were you interviewed individually?

22 A. Yes.

23 Q. Were you interviewed at the Legion or at a  
24 different location?

25 A. At the police station.

JILL M. CUTTER, RPR  
(513) 785-6596

1 MS. COOK-REICH: If I can have a second,  
2 Your Honor?

3 THE COURT: You may.

4 MS. COOK-REICH: I have no further questions for  
5 Ms. McCreary. Thank you.

6 THE COURT: Do you have anything, Mr. Eichel?

7 MR. EICHEL: No, we have no questions.

8 THE COURT: Ma'am, you may be released. Thank  
9 you. As to the comments by Mr. Porter about that the  
10 State is going to have to present evidence at the  
11 resentencing hearing, they don't have to re-prove the  
12 murder conviction. They don't have to re-prove the  
13 aggravating circumstance. I mean, that has been found  
14 and proven beyond a reasonable doubt and the jury is  
15 instructed on that. The additional evidence that they  
16 are allowed to put in, the Court traditionally monitors  
17 this closely. We don't just blanket allow the State to  
18 re-present all evidence that was admitted in the guilt  
19 phase. It has to pertain to the aggravating  
20 circumstance only, and it would be relevant to the  
21 aggravating circumstance. So any additional evidence  
22 that they submit is not going to be going towards  
23 re-proving the underlying crime. It is going to be  
24 towards what is relevant for the sentencing body to  
25 consider in being able to weigh that aggravating

10:30AM

10:31AM

JILL M. CUTTER, RPR  
(513) 785-6596



1 circumstance against the mitigating factors that will  
2 be presented. I wanted to make sure that we were all  
3 clear there as well. So when you talk about that they  
4 are going to have to call witnesses or that they are  
5 going to have to present evidence, I mean, the only  
6 evidence is going to be as pertains to the aggravating  
7 circumstance. And traditionally, that entails a  
8 re-submission of portions of the evidence from the  
9 guilt phase that are relevant to that aggravating  
10 circumstance.

10:32AM

11 MS. COOK-REICH: Your Honor, when I spoke  
12 previously and indicated the State had provided a list  
13 of witnesses, I have put my hand upon that. They filed  
14 supplemental discovery listed as H, on July 25th, 2008.  
15 And in that discovery, they have listed 46 witnesses  
16 including the ones that we have called thus far except  
17 for the records custodian.

18 THE COURT: I think out of fairness, you know,  
19 none of the counsel that are present in this courtroom  
20 right now were counsel of record on this trial. This  
21 is an unusual circumstance. This case, the sentence  
22 was vacated and remanded for resentencing, you know,  
23 decades after this original trial transpired. To the  
24 extent that the State is providing anything and  
25 everything that they have to the defense so that you

10:32AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 can learn everything possible that you need to know  
2 about this case to be able to adequately represent Mr.  
3 Davis is admirable, and it would be something that the  
4 Court would want them to do.

5 But again, I mean, in no trial that this Court has  
6 ever been involved in has it been a situation that  
7 because witnesses were listed in discovery that there  
8 was some type of a requirement that they be called or,  
9 in fact, I believe the rule prohibits comment on the  
10 witness list; who is and isn't called. The idea is to  
11 provide you discovery.

10:33AM

12 MS. COOK-REICH: Actually, and maybe I have a  
13 different concept of what the rule is, a list of  
14 witnesses they intend to call at trial and they have  
15 listed 46 of them including the ones that we have  
16 subpoenaed today, other than the records custodian we  
17 have subpoenaed no one who is not on their witness  
18 list.

19 MR. OSTER: Your Honor, to make a proffer inside a  
20 proffer I guess, as we stand here today, I did the  
21 discovery where I gave those names over. In looking at  
22 this case from 1983 trying to go through multiple  
23 boxes, it is hard to know exactly what is going to  
24 happen and how things will play out. It was out of  
25 caution that counsel, myself, gave over all of those

10:34AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 things and trying to make sure there wasn't anything  
2 missing.

3 Prosecutors, we are very nervous about Brady  
4 issues and we do try to take that seriously and I would  
5 rather give over a name that I am not going to use than  
6 have something come up where we are sitting here a week  
7 before trial and I have to look at Your Honor and say  
8 there is something that should have been and there is  
9 not. That is not a position that is liked by  
10 prosecutors as we sit here.

10:34AM

11 THE COURT: And quite frankly, that is what is  
12 guiding the Court today in terms of, again, I am  
13 trying, consistent with the law, to allow defense  
14 counsel to have latitude to be able to explore issues  
15 that are going to be relevant to this resentencing, but  
16 up to this point, I mean, it appears to me that there  
17 is really an attempt to try to attack the guilt finding  
18 in the case and that is simply -- that is not before  
19 the Court. That is something that has been affirmed.

20 we are here to get ready for a resentencing, to  
21 allow any motions that are appropriate to be determined  
22 prior to that resentencing hearing to be heard, and  
23 again, I am proceeding in a cautious manner because,  
24 quite frankly, this is a matter that is unusual in its  
25 posture, procedural posture. And I think all of us,

10:35AM

JILL M. CUTTER, RPR  
(513) 785-6596



1 you know, need to be given the opportunity to explore  
2 certain avenues here maybe more so than in a standard  
3 case, but that doesn't mean that we have cart blanche  
4 to go and try to retry the guilt phase of the trial.

5 And so, counsel, please, as you go through these  
6 witnesses keep in mind what is at issue in a  
7 resentencing and let's address those issues.

8 MS. COOK-REICH: Can we have a second, Your Honor?  
9 (Defense counsel confers off the record.)

10 MR. PORTER: If it may please the Court, if the  
11 Court has made anything clear today it is that the  
12 Court is not going to let us proceed with respect to  
13 the motion to suppress. That is what we are prepared  
14 to do here today. So again, this case is going to go  
15 up to numerous rounds of appeal.

16 At this point we intend to offer no more evidence  
17 with respect to the motion to suppress only because of  
18 the Court's comments that we can't address that issue  
19 when we call witnesses. It doesn't make any sense to  
20 do that. And the second thing I would take objection  
21 to and the record should not reflect that the  
22 prosecutor has given us anything and everything. That  
23 should be readily apparent given the fact that the  
24 Court wouldn't order that the information regarding the  
25 pretrial identification be turned over.

JILL M. CUTTER, RPR  
(513) 785-6596

1           So at this point, let the record reflect we will  
2           be calling no more witnesses because the Court has  
3           indicated that it does not want to hear any testimony  
4           with respect to the motion to suppress.

5           THE COURT: What I am going to indicate is that I  
6           have welcomed you to present any testimony that might  
7           pertain to any mitigating evidence, any mitigating  
8           factor that this Court would be -- or that a  
9           three-judge panel or a jury would ultimately be  
10          weighing in this matter, but to the extent that the  
11          evidence that is presented, and up to this point all  
12          goes to witness credibility issues that were determined  
13          at trial, those kind of issues, you know, that is not  
14          something that the Court is going to relitigate. The  
15          conviction in the case is final. The conviction has  
16          been affirmed. It has been final. It wasn't reversed  
17          by the 12th District. It wasn't reversed by the Ohio  
18          Supreme Court. And it has not been reversed by any  
19          federal court that has reviewed it.

10:38AM

20          MR. OSTER: Your Honor, if I may as well, looking  
21          over notes as I have been having to go back and look at  
22          different witnesses who may or may not be here, we have  
23          talked about the law of the case and res judicata on  
24          page 163 of the transcript, which I know Your Honor has  
25          not looked at pursuant to the defense making a motion

10:39AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 in that regard. The defense in this case did make a  
2 motion to strike the in-court identification due to the  
3 impermissible picture of the defendant. At one point  
4 on page 164 then, the trial court overruled that motion  
5 and said it went to the weight of the testimony. That  
6 issue was then not appealed, but it was made part of  
7 the trial record. It was overruled very similar to  
8 what Your Honor just said as to the weight of the  
9 testimony.

10 I know Your Honor has not had a chance to look at  
11 that, but inside of this proffer I would like to put  
12 that on the record that that was there. It was chosen  
13 not to be an appeal issue and it does go to exactly  
14 what has been litigated here today.

10:39AM

15 THE COURT: Mr. Porter, hold on a second. What  
16 you are indicating when you say you are not going to  
17 call any further witnesses, is that you would expect  
18 that the testimony of the witnesses that you have here  
19 remaining would be similar in nature to what has been  
20 presented thus far?

10:40AM

21 MR. PORTER: And that the Court is going to  
22 preclude us from asking questions regarding the  
23 pretrial identification procedures as it has with the  
24 other witnesses.

25 THE COURT: All right.

JILL M. CUTTER, RPR  
(513) 785-6596



1 MR. PORTER: And the other comment I would make,  
2 what is interesting is that when counsel did object  
3 during the trial to the impermissible eyewitness  
4 identification procedure, the Court says it goes to the  
5 weight of the evidence. Truly it does not. It goes to  
6 the admissibility. Thank you.

7 THE COURT: All right.

8 MR. EICHEL: Well, if Your Honor, please, again I  
9 object to the defense counsel's characterization of the  
10 Court's ruling. The motion and the record that Mr. 10:40AM  
11 Oster already pointed out on page 163 of the trial  
12 transcript that dealt with the testimony of Cozette  
13 Massy, who -- I presume the defense was ready to call  
14 her this morning, and has chosen now not to.

15 THE COURT: well, you know, I don't feel that I  
16 have been restrictive. I mean, I have been allowing  
17 you to proceed. I have just been waiting for it to  
18 pertain to something relevant to the matter which is  
19 before the Court. And I fail to see the legal  
20 distinction that counsel is making on a motion to 10:41AM  
21 suppress. I mean, you wouldn't file a motion to  
22 suppress to prevent something from being heard at the  
23 sentencing hearing in a capital case. Motions to  
24 suppress are by their very nature pretrial. I mean, to  
25 the extent that you will be objecting to certain

JILL M. CUTTER, RPR  
(513) 785-6596

1 evidence being considered by a jury or a three-judge  
2 panel for purposes of sentencing, you still have that  
3 option. Nothing that is happening today would preclude  
4 you from being able to object at the appropriate time,  
5 and the Court will then make a ruling based on what is  
6 being offered into evidence and what the objections are  
7 at that time. But to the extent that counsel  
8 characterizes this as a motion to suppress the pretrial  
9 and trial identifications relating to this defendant  
10 that -- I mean, I don't see any way that any of the 10:42AM  
11 information that is presented to this Court thus far  
12 has not been designed to attack the guilt finding. It  
13 appears that it is all oriented towards the guilt  
14 finding and that matter has been determined. That is  
15 not before the Court.

16 So, if you have something further with regard to  
17 mitigation, feel free to proceed. If not, then I  
18 certainly honor your decision not to call any further  
19 witnesses. All right. Do you wish to -- are there any  
20 other witnesses here on any of the other motions today? 10:43AM

21 MR. PORTER: None today, Your Honor.

22 THE COURT: All right. Do you wish to argue,  
23 present oral argument on any of these motions or are  
24 you simply submitting them based on the written  
25 argument? You certainly should have an opportunity to

JILL M. CUTTER, RPR  
(513) 785-6596

1 present any oral argument in support of all or any of  
2 these motions that you desire.

3 MS. COOK-REICH: We would like to argue, Your  
4 Honor. There is one that we wish to submit on. Let me  
5 get to my record. We would submit on F, motion to  
6 dismiss the capital specification contained in the  
7 indictment. If I could have one second to make sure  
8 that people aren't sitting outside --

9 THE COURT: That is F as in Frank?

10 MS. COOK-REICH: Yes.

10:44AM

11 THE COURT: Yes, as a courtesy if you are not  
12 calling any further witnesses, feel free to release  
13 them. Thank you.

14 MS. COOK-REICH: Thank you, Your Honor.

15 THE COURT: All right. You were saying that you  
16 wanted to -- which one -- was there one that you wanted  
17 to argue or one that you wanted to submit?

18 MS. COOK-REICH: I thought we would get over the  
19 one that we wish to submit, which is F, motion to  
20 dismiss capital specifications contained in the  
21 indictment.

10:45AM

22 THE COURT: Does the State agree to submit that  
23 matter?

24 MR. EICHEL: Yes, Your Honor. We will submit it  
25 also.

JILL M. CUTTER, RPR  
(513) 785-6596



1 THE COURT: All right. I will take that matter  
2 under advisement. You may proceed with oral argument  
3 then and just identify the motion. What I would prefer  
4 that we do is allow you to argue a motion and then hear  
5 a response from the State before we proceed to the next  
6 motion to try to keep things as focused and clear as  
7 possible.

8 MS. COOK-REICH: We will proceed forward  
9 alphabetically. D as in David, motion for disclosure  
10 of exculpatory evidence. Obviously I will not go back 10:46AM  
11 through the multiple-page memorandum placed in the  
12 record, Your Honor.

13 THE COURT: I will indicate for the record that I  
14 have read the 11-page motion for disclosure of  
15 exculpatory evidence. I have also reviewed the  
16 two-page response from the State. So I have done that  
17 prior to the oral argument.

18 MS. COOK-REICH: I won't go on ad nauseam on this.  
19 I would just indicate to the Court as our memorandum  
20 suggests and indicates that the evidence we are seeking 10:46AM  
21 to insure has been placed within the record and it  
22 dovetails into the issue that we were trying to get to  
23 on pretrial identification. We are requesting that the  
24 Court order that the State affirmatively on the record  
25 indicate that there are no memorandum, notes, reports,

JILL M. CUTTER, RPR  
(513) 785-6596

1        regarding any Brady material, any exculpatory evidence  
2        that go to both any potential exculpatory evidence for  
3        Mr. Davis including the photo lineup procedures which  
4        we were attempting to go through relative to the motion  
5        to suppress.

6                As you are aware, we had the records custodian  
7        come in from the Hamilton Police Department. This is  
8        kind of dovetailed in with that because we wanted to  
9        see what records were contained within the Hamilton  
10       Police Department still. As you have heard the  
11       testimony, they have no records at their police  
12       department. We would like the Court to order the State  
13       to affirmatively state that they have provided any and  
14       all relevant information.

10:47AM

15               THE COURT: All right. And just to the extent  
16       that -- Brady applies to both issues involving guilt  
17       and mitigation, and so to the extent obviously that the  
18       State -- that the State has a Brady obligation that  
19       continues. Obviously if there was exculpatory  
20       information regarding guilt, I would expect that that  
21       would have already been provided and certainly if there  
22       is anything you have, you would have an obligation to  
23       present that. But I think that this is more oriented  
24       at this point in time given the posture of the case  
25       towards Brady material regarding mitigation.

10:48AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 MR. OSTER: Yes, Your Honor. The State has no  
2 problem acknowledging that Brady does extend to the  
3 mitigation hearing. I think we have acknowledged that  
4 much. We have also acknowledged previous discovery  
5 given February 8th, '84, April 20th, '84, April 27th,  
6 '84, and what would be motion H, which was Davis'  
7 demand for discovery, we did give discovery over as  
8 well. I can look back on the exact date, but obviously  
9 it was in year 2008 now. I believe we filed that July  
10 25th, 2008.

10:48AM

11 The State has been in contact with and working  
12 with detectives from the Hamilton Police Department  
13 trying make sure we get all of the information we can.

14 THE COURT: So you are observing or cognizant of  
15 your continuing duty to investigate and disclose as  
16 well?

17 MR. OSTER: Yes, Your Honor and we obviously  
18 realize that Brady continues up until the date and  
19 through the trial. So if anything would come up we  
20 would give it to defense counsel immediately.

10:49AM

21 THE COURT: All right. Anything further on that  
22 motion?

23 MS. COOK-REICH: Just two notes, that it also  
24 extends to impeachment evidence as well as their actual  
25 constructive possession. So I certainly understand

JILL M. CUTTER, RPR  
(513) 785-6596



1 that he is indicating he is in contact with the  
2 detective from the Hamilton Police Department, but as  
3 you have heard the records custodian from the police  
4 department testify, the detectives involved in this  
5 case kept -- may have, in fact, kept their own records.

6 THE COURT: There was a question about that. I  
7 think the witness testified that she doesn't know what  
8 they did.

9 MS. COOK-REICH: They are not contained in the  
10 Hamilton Police Department records, so we would ask the  
11 court -- our position is that simply contacting a  
12 current detective at the Hamilton Police Department is  
13 not sufficient to insure that all Brady material has  
14 been disclosed. It would require them to actually  
15 contact the detectives that are still living, whether  
16 they live in Ohio or not, and make sure that they are  
17 not hanging on to any impeachment or exculpatory  
18 evidence also, Your Honor.

19 MR. OSTER: If it may please the Court, Your  
20 Honor, the only thing I would say is our detective has  
21 tracked down the previous detectives, the people he can  
22 find; who is dead and who is alive. He has tried to  
23 talk to people. So we are, on a continuing basis,  
24 trying to do that and get everything we can. We  
25 understand Brady and we are fully willing to comply

10:49AM

10:50AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 with it.

2 THE COURT: All right. All right. Which motion  
3 do you want to address next?

4 MS. COOK-REICH: It would probably be best to go  
5 to the sealed copy E, motion to require a sealed copy  
6 of the prosecutor's file to be made part of the record.

7 THE COURT: Are you going to be arguing this, Mr.  
8 Porter?

9 MS. COOK-REICH: Mr. Porter will argue this one.

10 THE COURT: You may proceed.

10:51AM

11 MR. PORTER: Briefly, Your Honor, I understand the  
12 Court has latitude in this area. The Court has  
13 discretion in this area. But we would direct the  
14 Court's attention and it's in our outline or I'm sorry  
15 in our motion of State vs. Brown in which case, the  
16 Ohio Supreme Court reversed a capital conviction  
17 recently. And I understand it is the Court's position  
18 we are only here on sentencing in which the Court  
19 ordered that the prosecutor's file out of an abundance  
20 of caution be sealed and made a part of the record for  
21 purposes of later review. Given the nature of the  
22 punishment involved here, we would ask the Court to  
23 adopt the same precaution. I certainly wasn't there.  
24 I am speculating a tad on this, Your Honor, but I would  
25 gather when State vs. Brown -- it was argued in the

10:51AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 trial court and the defense counsel made the motion to  
2 have the prosecutor's file be sealed and made part of  
3 the record and we aren't asking to look at the file,  
4 Your Honor. All we are asking is a copy be sealed. I  
5 am sure the prosecutor in that case stood up and argued  
6 that they knew what the Brady obligation was. The  
7 Judge still out of precautions, given the nature of the  
8 penalty, made it be part of the record. And, in fact,  
9 later on it was determined through oversight or  
10 whatever, it makes no difference for purposes of Brady,  
11 that there was some Brady material and warranted the  
12 granting of a new trial.

10:52AM

13 I understand the Court is well aware that if the  
14 Court denies the motion we will not be successful on  
15 appeal. The Court does have the discretion to be safe.  
16 We ask the Court out of an abundance of caution to seal  
17 the -- to order a copy of the prosecutor's file be  
18 sealed.

19 THE COURT: All right. Thank you, Mr. Porter. Do  
20 you wish to present anything above and beyond your  
21 memorandum?

10:53AM

22 MR. EICHEL: No. I would like to reiterate in our  
23 memorandum we cited State vs. Craft. 12th District  
24 case.

25 THE COURT: That was Judge Crehan's case, correct?

JILL M. CUTTER, RPR  
(513) 785-6596



1 MR. EICHEL: Yes. The Court held the trial court  
2 abused his discretion in ordering something over and  
3 above what Criminal Rule 16 requires, and the Supreme  
4 Court law in capital cases has well establish the trial  
5 Court is not required to seal the prosecutor's file,  
6 based on speculation that the prosecutor might have  
7 withheld exculpatory evidence. It is a well-worn  
8 issue.

9 THE COURT: All right.

10 MR. PORTER: One comment, if the State has adopted  
11 the position they have done all they can to provide us  
12 with exculpatory evidence, then they should have no  
13 objection to, in fact, sealing a copy of their file.  
14 And again, we would point out to the Court, State vs.  
15 Brown.

10:54AM

16 THE COURT: All right. Matter will be taken under  
17 advisement.

18 MS. COOK-REICH: We have submitted on motion F,  
19 Your Honor, and we have had testimony on G. That would  
20 leave us with H, which is defense limited demand for  
21 discovery.

10:54AM

22 THE COURT: You can argue G if you like. I  
23 haven't made a final ruling.

24 MS. COOK-REICH: Nothing further to argue on that,  
25 Your Honor. Let me just check on that. We have

JILL M. CUTTER, RPR  
(513) 785-6596

1 nothing further to argue on that. Thank you. H,  
2 limited demand for discovery, I think I kind of  
3 addressed that when we first began this morning and I  
4 am mostly responding to the State's response and their  
5 statements in there that they are assuming that we are  
6 providing reciprocal discovery. And I want to place  
7 the Court and prosecutor on notice that we specifically  
8 titled that limited demand for discovery for a purpose.  
9 It wasn't just a demand for discovery.

10 THE COURT: Well --

10:55AM

11 MR. OSTER: Your Honor, I guess to state the  
12 obvious, the State has a different position. When we  
13 argued -- just argued D, motion for disclosure of  
14 exculpatory as well as here in H, the State has given  
15 multiple items of discovery over. This case is in a  
16 mid-trial setting. It is not new. It is not something  
17 where things can be undone. The rules of discovery  
18 would still stand.

19 There is nothing here saying that once a trial has  
20 progressed, discovery has been given three to four  
21 times, that now the defense can somehow invoke this  
22 shield to say we no longer have to give any discovery  
23 even though we have been given everything throughout  
24 the entirety of this case. I think that what the State  
25 would ask and what the rules of discovery would require

10:55AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 is that since this case is ongoing, since discovery has  
2 been given, since discovery has been asked for multiple  
3 times, that the discovery rules apply and both sides  
4 give discovery equally.

5 THE COURT: Ms. Cook-Reich, let me just make sure  
6 that I clarify. Are you indicating that your position  
7 right now is that you are not obligated to provide  
8 reciprocal discovery. You are not saying that if the  
9 Court were to put on an order that you would be  
10 disobeying the Court's order?

10:56AM

11 MS. COOK-REICH: I would never disobey a Court's  
12 order, Your Honor.

13 THE COURT: I guess -- all right.

14 MS. COOK-REICH: And if I could say, there is no  
15 motion, at least currently by the prosecutor, in the  
16 posture that we are standing here today, there is no  
17 motion by the State to request -- at least a written  
18 motion to request the State -- by the State to request  
19 the defense to provide discovery. There is simply  
20 their response to our H indicating they assume we are  
21 going to provide that.

10:57AM

22 If I could speak to D. It would seem that Mr.  
23 Oster was trying to imply that D was -- motion D was  
24 additionally in regards to criminal rules, discovery  
25 rules. That is specifically also entitled under Brady

JILL M. CUTTER, RPR  
(513) 785-6596



1 rules and the constitution, so I just point that out to  
2 the Court.

3 MR. OSTER: Reciprocal discovery will obviously be  
4 filed in this case, Your Honor.

5 THE COURT: Are we at I?

6 MS. COOK-REICH: Mr. Porter is going to address  
7 this motion.

8 MR. PORTER: The motion speaks for itself.

9 THE COURT: Okay.

10 MR. PORTER: The Ohio Supreme Court numerous times  
11 has said that you have the discretion to go beyond what  
12 is required of Criminal Rule 16. We have cited the  
13 Court to those cases. This Court today has taken --  
14 repeatedly cited to the fact that this case is 24 years  
15 old or 25 -- and I am sorry, I don't remember the exact  
16 number and I don't mean to misstate you, Your Honor.

10:57AM

17 THE COURT: It depends on where you start I guess,  
18 but I think it is '83 to today from the incident is 24  
19 to 25 because I think it was December of '83, so that  
20 is 24, going on 25 years.

10:58AM

21 MR. PORTER: Given the discretion the Court has  
22 given the fact that it is a 25-year-old case, given the  
23 fact that we have a duty to go back and investigate  
24 everything, it's really hard to go back 25 years as the  
25 Court has seen from one of the witnesses who could not

JILL M. CUTTER, RPR  
(513) 785-6596

1 even remember. My recollection of her testimony was  
2 she wasn't even sure if she signed her statement,  
3 wasn't too sure of the contents of the statement. It  
4 is really hard to go back and talk to and effectively  
5 interview those witnesses. Red is entitled to that  
6 type of investigation, so we would ask the Court to  
7 exceed what is permitted under Criminal Rule 16 and the  
8 authority is there for the Court to do if it so  
9 chooses.

10 MR. EICHEL: May it please the Court, in addition  
11 to what I have written, and I cited again State vs.  
12 Craft in my memorandum, point out in addition to that,  
13 that State vs. Craft is unusual because it was a  
14 30-year-old case and in addition to that fact, it was a  
15 30-year-old case that had never been tried 30 years  
16 ago.

10:59AM

17 THE COURT: That was the case where he was  
18 declared incompetent: Is that correct? Why was it  
19 30 years old? Remind me. That wasn't my case.

20 MR. EICHEL: The defendant's identity was  
21 discovered in the aggravated murder case almost  
22 30 years -- and he was indicted almost 30 years to the  
23 day after he committed the rape and kidnapping of this  
24 girl. Murder. He was charged with aggravated murder  
25 in that case. And 30 years later Judge Crehan thought

10:59AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 it was within his discretion to order extra Criminal  
2 Rule 16 discovery. The Court of Appeals said no, the  
3 Court abused its discretion when it went into matters  
4 that are specifically addressed by Criminal Rule 16.

5 The Court of Appeals declared the trial court's  
6 discovery order null and void. In that, part of that  
7 trial court's order it was declared null and void. The  
8 Judge took it on himself to take a bunch of witness  
9 statements in camera inspection for Brady material.  
10 The Court of Appeals specifically said that was an  
11 abuse of discretion. Criminal Rule 16 (b)(2)  
12 specifically provides information not subject to  
13 disclosure. Case law says that a witness statement is  
14 discoverable only when the person has testified on  
15 direct examination and the request is made --

11:00AM

16 THE COURT: I'm familiar with the procedure.

17 MR. EICHEL: We don't have that in the case. The  
18 trial is over. We had a trial in this case.

19 THE COURT: And I'm assuming that -- and again, I  
20 don't have the benefit of having read the trial  
21 transcript at this point. Again, I have been  
22 attempting to honor a request that was made by Mr.  
23 Porter earlier in that regard, but I would assume that  
24 that procedure was followed during the trial if, in  
25 fact, it was requested and that after direct

11:01AM

JILL M. CUTTER, RPR  
(513) 785-6596



1 examination if there was a witness statement that was  
2 provided, there was an opportunity for an in camera  
3 review for inconsistencies and the procedure that is  
4 contemplated by the rules, and I imagine that those  
5 statements then would have been preserved for the  
6 record.

7 MR. EICHEL: To that extent, yes, I believe we saw  
8 one of those today. It was a Joint Exhibit 2. I think  
9 there was Joint Exhibit 1 as well that might have also  
10 been a witness statement of one witness that was called  
11 and testified at trial.

11:02AM

12 THE COURT: Okay.

13 MR. PORTER: We just -- not to beat a dead horse,  
14 the Court has our pleadings. I understand the Court  
15 will file an opinion. We just ask the Court to look at  
16 the Ohio Supreme Court cases we cited as opposed to  
17 appellate court cases.

18 THE COURT: So it is clear, I mean, not only will  
19 the Court dutifully read the motions that have been  
20 filed, but the Court will also peruse the case law that  
21 is cited and frequently the Court reviews case law  
22 above and beyond that that has been cited by counsel in  
23 these motions, so I will definitely honor that request,  
24 Mr. Porter.

11:02AM

25 MR. PORTER: I am just struck by as Ms. Cook-Reich

JILL M. CUTTER, RPR  
(513) 785-6596

1 pointed out to me a minute ago, once again that is the  
2 State saying we have provided anything and everything  
3 and anytime we have asked for a little bit additional  
4 under the criminal rules they are fighting us tooth and  
5 nail.

6 THE COURT: All right. That matter is under  
7 advisement. Next?

8 MS. COOK-REICH: J, motion to compel law  
9 enforcement officials to provide the prosecuting  
10 attorney will all the information acquired during the  
11 course of their investigation. Mr. Porter will handle  
12 that motion.

11:03AM

13 THE COURT: Mr. Porter?

14 MR. PORTER: I am never quite sure, having  
15 prosecuted for five years in the darker period of my  
16 life, of why prosecutors fight this. It was always my  
17 experience when I prosecuted that one of the greatest  
18 challenges from prosecuting was to try to get all of  
19 the information from the cops.

20 THE COURT: As I read the response I don't think  
21 they are.

11:04AM

22 MR. PORTER: I was unclear from the response to be  
23 honest with you. I read it twice.

24 THE COURT: Okay.

25 MR. PORTER: And if, in fact, the Court -- if in

JILL M. CUTTER, RPR  
(513) 785-6596

1 fact, they concede, I certainly do not want to be  
2 taking up the Court's time. I'm always going back to  
3 -- I have been doing this work too long and was arguing  
4 these motions in the mid-eighties.

5 THE COURT: well, I think they have a similar  
6 desire to want to know everything there is to know  
7 about the case from law enforcement to the extent that  
8 that is an arm of the State. I think -- that is how I  
9 interpreted their response.

10 MR. PORTER: So if they are conceding I will sit  
11 down and not take up the Court's time.

11:04AM

12 MR. EICHEL: I think the motion is unnecessary. I  
13 think law enforcement cooperates with us at our  
14 request. So I don't see a problem with that. I do  
15 find it kind of curious that the State agency, we  
16 requested their records and they are fighting that. I  
17 don't understand.

18 MR. PORTER: I want to speak to that last -- the  
19 prosecution agrees that it should have the cooperation  
20 of every state agency possessing information relevant  
21 to Davis. This obviously includes the DRC. They  
22 aren't involved in the prosecution. I mean, do we get  
23 records that they have on the postal inspector? That  
24 is just a red herring. We have said all along we have  
25 those records. We don't need you to enter an order for

11:05AM

JILL M. CUTTER, RPR  
(513) 785-6596



1 the prosecution to get a copy of --

2 THE COURT: I can't even address that issue.

3 MR. PORTER: Well, they are the ones that went  
4 there, Your Honor.

5 THE COURT: well, I understand and just so it is  
6 clear, I wasn't addressing it in their response. I am  
7 not addressing it in yours. That is a matter that is  
8 before the Ohio Supreme Court at this point in time.  
9 My interpretation of the case law is that I am without  
10 authority to act on that narrow issue until the  
11 appellate issue is resolved.

11:06AM

12 MR. PORTER: And the prosecutor raised the issue  
13 of why I filed the motion. Most of my practice is in  
14 federal court looking at these cases. I was involved  
15 in the case out of Hamilton County several years ago  
16 that took I think about a decade to litigate. It  
17 turned out that the police had not turned over most of  
18 their file, they only turned over stuff that was  
19 helpful. That individual that we were representing in  
20 that case is now the 122nd person to walk off death row  
21 in this country a free man. So that is the purpose of  
22 filing this motion.

11:07AM

23 THE COURT: Thank you, Mr. Porter. Similarly that  
24 matter will be taken under advisement.

25 MS. COOK-REICH: K I believe is the same thing as

JILL M. CUTTER, RPR  
(513) 785-6596

1 G, which we have already dealt with. We would like to  
2 address L and N tomorrow as we have some witnesses that  
3 I didn't think we would get to today. I didn't want  
4 them sitting here all day. Rather than deal with N,  
5 which is the motion for funding which really relates to  
6 P, which is a motion on the lethal injection, I would  
7 like to skip O and come back to P and N if I could.  
8 And O is the motion to transcribe Grand Jury  
9 proceedings and Mr. Porter will --

10 MR. PORTER: It's a simple motion. It doesn't ask  
11 that we get access. It just asks that it be  
12 transcribed so if an issue comes up, and we request the  
13 Court to look at it, this Court won't be put in a  
14 position of, for instance -- and I am not trying to be  
15 presumptuous. I have been involved in some cases where  
16 it wasn't transcribed. There was a jury. The judge  
17 didn't want to wait around for it to be transcribed,  
18 and hence, the case just got continued on. All we are  
19 asking is that it be transcribed.

20 THE COURT: All right. Anything?

21 MR. OSTER: Very simply, obviously the Court is  
22 well aware of the particularized need standard. "If" I  
23 don't believe qualifies as a particularized need. I  
24 also think the case State vs. Davis, 88, which is 38  
25 Ohio, which is the site, Ohio State 3rd 361 that issue

JILL M. CUTTER, RPR  
(513) 785-6596

1 was raised. It's in our motion as a footnote one,  
2 where they previously argued to the Ohio Supreme Court  
3 Grand Jury transcript should have been disclosed only  
4 to have the Court reject that argument. And we ask  
5 again the Court to reject it as the Ohio Supreme Court  
6 did.

7 MR. PORTER: I am back to we aren't asking it to  
8 be disclosed to us. We are asking that it be  
9 transcribed. Is it yes or no? Are you objecting to it  
10 being transcribed?

11:09AM

11 MR. OSTER: Yes.

12 MR. PORTER: And, you know, what is real  
13 interesting is they gave -- they transcribed it. They  
14 gave it to the federal district court judge and they  
15 are here today telling you they won't transcribe it. I  
16 have problems with that.

17 THE COURT: You know more about it than I do at  
18 this point. I am not aware that it has been  
19 transcribed and presented to anyone else, but  
20 obviously, I understand what your request is, that it  
21 is simply to have it transcribed and ready. I  
22 understand your response and that matter will be taken  
23 under advisement.

11:09AM

24 MR. PORTER: Well, we would request the Court's  
25 permission to submit one additional exhibit in support

JILL M. CUTTER, RPR  
(513) 785-6596



1 of this.

2 THE COURT: Okay. well, not at this time?

3 MR. PORTER: No, we just want to submit an  
4 additional exhibit which if we could have a half hour  
5 to find it.

6 MS. COOK-REICH: We thought we were going to get  
7 to that tomorrow.

8 THE COURT: That's fine.

9 MR. OSTER: The only thing that I would say is  
10 there has been a lot of mention of, well, the State  
11 could do this or could do that or a lot of other  
12 things. There are rules out there that the State is  
13 following. we don't see the need not to follow those  
14 rules. Obviously some of those things are there for a  
15 reason.

11:10AM

16 THE COURT: There is no jury here. I mean, I  
17 understand what the law is. I understand what the  
18 requirements of counsel are. I understand discretion.  
19 I understand those issues, and I am taking all of that  
20 into consideration. All right. Were you going to  
21 address P and then N?

11:10AM

22 MS. COOK-REICH: Yes, Your Honor.

23 THE COURT: Because I guess I had one issue that I  
24 -- I had a question before we got into it, because I  
25 didn't note that it was raised by either side, but my

JILL M. CUTTER, RPR  
(513) 785-6596

1 preliminary question in every case that I reviewed  
2 involving challenges to either Ohio's lethal injection  
3 protocols or other states, it is always been a position  
4 where the person who raised the issue has been a person  
5 who has actually been sentenced to death and in this  
6 case, we don't know -- we are not in that posture.

7 The death sentence has been vacated. It has been  
8 remanded for resentencing. It is one option at this  
9 point as we stand here among three. And I guess my  
10 first question is, is there proper standing at this  
11 point to raise the issue?

11:12AM

12 Now, I understand that Judge Burge in the Rivera  
13 case did, but I mean, that is not authority that is  
14 binding on the Court. I guess I am interested is there  
15 any appellate authority or Supreme Court authority or  
16 federal authority, where there has been an instance  
17 where a person who has not been sentenced to death has,  
18 you know, been found to have standing to challenge the  
19 death penalty?

20 MR. PORTER: The Court raises a good issue. I can  
21 give the Court some authority. It's not directly on  
22 point. The Rivera case has an interesting history in  
23 that -- and I don't know if the Court has had an  
24 opportunity meet with Judge Burge or not.

11:12AM

25 THE COURT: I have not. I know other -- I believe

JILL M. CUTTER, RPR  
(513) 785-6596

1 I have met other judges from Lorain County, but not  
2 Judge Burge.

3 MR. PORTER: And I understand it is backhanded  
4 authority, so if the Court would just give me a minute  
5 to address this issue. As Judge Burge announced, he  
6 was going to hold the hearing. He then entered a  
7 discovery order for DRC to turn over specific material  
8 so the hearing could go forward. The Lorain County  
9 prosecutor then sued Judge Burge in the Ohio Supreme  
10 Court to preclude him from going forward with a hearing  
11 on lethal injection.

11:13AM

12 The Ohio Supreme Court denied that motion.  
13 Whether that is actually a ruling on standing, if the  
14 Court would want additional briefing, I am sure Ms.  
15 Cook and I would submit additional briefing on the  
16 issue. But that is the best I can offer this Court.  
17 And I understand -- I am sorry, Your Honor, I misspoke.  
18 It is also my understanding -- and I can't give you the  
19 Judge's name. I should be able to. I apologize -- is  
20 that one of the Mahoney Common Pleas Court judges is  
21 now conducting a hearing or has conducted the hearing  
22 in regard to the matter.

11:14AM

23 THE COURT: In a status that is --

24 MR. PORTER: Pretrial.

25 THE COURT: Okay.

JILL M. CUTTER, RPR  
(513) 785-6596



1 MR. PORTER: And other than that, if the Court  
2 would like additional briefing, we certainly welcome  
3 the opportunity.

4 THE COURT: The reason I asked the question is I  
5 was looking at this and thinking that obviously, you  
6 know, there is -- his sentence has not been determined  
7 obviously. That is the critical issue that this Court  
8 is going to have to determine, whether again it is with  
9 participation of a jury or through a three-judge panel,  
10 because that issue has not been resolved yet. But you  
11 know, in Baze vs. Rees, just the first page,  
12 "Petitioners, convicted murderers, sentenced to death  
13 in Kentucky State Court," and as I went through and did  
14 a westlaw search, every case I found out of every  
15 jurisdiction it was -- the lethal injection protocol  
16 was being challenged by individuals who had been  
17 sentenced to death, not by someone in a pretrial  
18 posture or someone -- I certainly didn't find any cases  
19 where there was a situation like this because I think  
20 it is an unusual, like I said, an unusual procedural  
21 posture. I did note in State vs. Huertas, 51 Ohio St.  
22 3rd. 22, on -- and again it is not directly on point,  
23 but in this case, under section nine, miscellaneous  
24 issues, the last paragraph on page 14 -- well, no, I  
25 guess that is not the proper page. Let me see. Let me

11:15AM

11:15AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 get the correct page cite. Looks like it would be on  
2 page 32 of the actual decision. It says, "In a 17th,  
3 18th, 20th and 21st propositions of law appellant  
4 attacks the constitutionality of Ohio's capital  
5 punishment scheme and these arguments have been  
6 rejected in previous cases. And they cite Spisak,  
7 Poindexter, Steffen, Buell, Jenkins. Then the next  
8 line, "In addition, appellant has no standing to attack  
9 the death penalty because we have vacated his death  
10 sentence." Then in a 9th District case, State vs.  
11 Caldwell, again, it is not -- it was an assignment of  
12 error. It says, "Caldwell argues that the aggravated  
13 murder charge should have been dismissed because the  
14 death penalty is unconstitutional. Caldwell does not  
15 have standing to attack the death penalty because he  
16 was not sentenced to the death penalty." So it's not  
17 exactly the same situation here, but it says, "This  
18 Court will not issue an advisory opinion as it is  
19 beyond the scope of proper judicial authority." And  
20 they overruled that assignment of error.

11:16AM

11:17AM

21 In State vs. Brooks out of the 8th District, 1991  
22 decision, that is similar to the last one. It talks  
23 about, "Appellant argues in his 13th, 19th and 20th  
24 assignment of error issues which challenge the  
25 constitutionality of the death penalty statute,

JILL M. CUTTER, RPR  
(513) 785-6596

1        appellant in his brief states the reason he argues the  
2        death issues albeit he was not sentenced to death, is  
3        because quote the specter of the death penalty  
4        permeated the entire trial proceeding."

5                The Court goes on to say there is well-settled  
6        rule of law that generally a person only has standing  
7        to attack the constitutionality of rules and  
8        regulations that have affected his interest, those that  
9        have been applied to him. And it cites McNea vs.  
10       Garey, which is a federal case out of the northern  
11       district and then Akron Board of Education vs. State  
12       Board of Education, a 6th Circuit case. They say the  
13       constitutionality of state statute may not be brought  
14       into question by one who is not within the class  
15       against whom the operation of the statute is alleged to  
16       have been unconstitutionally applied and who has not  
17       been injured by its alleged unconstitutional provision.  
18       Because appellant did not receive the death penalty is  
19       not a member of the class claimed to be offended by the  
20       challenges statute, hence he lacks standing.

11:18AM

11:18AM

21                Again, I understand the distinction factually from  
22        this case, but I am concerned about the extent to which  
23        it is instructive.

24                MR. PORTER: would the Court like additional  
25        briefing?

JILL M. CUTTER, RPR  
(513) 785-6596



1 THE COURT: You know, I think it may be helpful.  
2 I am not trying to make work, but it appears to me that  
3 in looking at the issue that would be the critical  
4 concern and, of course, I am not sure to the extent  
5 that this case would have any factual difference from  
6 Rivera, I mean, that wasn't appealed. I noticed -- I  
7 looked up the notice of appeal as to the 9th District.  
8 It wasn't to the Ohio Supreme Court, so I don't know  
9 that we would receive any dispositive ruling from that  
10 court in time to impact us or not, but it seems to me 11:19AM  
11 that there may be -- if indeed there is a standing  
12 issue, it may behoove all of us to wait and see whether  
13 it is an issue in the case and in the meantime, whether  
14 there is further instruction provided out of that  
15 appeal with the idea that should it become an issue, we  
16 can then take a look at whether this is the proper  
17 vehicle or whether it really should be separate.  
18 Because in Baze, for example, they filed a separate  
19 suit, the petitioners in that case, they filed a  
20 separate suit in state court asserting that the 11:20AM  
21 Commonwealth's lethal injection protocol violates the  
22 8th Amendment being cruel and unusual punishment. And  
23 there the state trial court I believe had a seven-day  
24 trial with 20-some odd witnesses, and all of that to  
25 address those issues. And I understand that your

JILL M. CUTTER, RPR  
(513) 785-6596

1 motion, as does Judge Burge's decision, also invokes  
2 the separate state statute and I understand those  
3 issues are at play, so I am not suggesting that, you  
4 know, by looking at their standing in Baze, that Baze  
5 is necessarily completely dispositive of the issue. I  
6 mean, we're not there yet to be making those  
7 determinations.

8 But I guess I would want to be sure given the  
9 limited, you know, scope of judicial authority, that,  
10 you know, we are in a position where we are -- he has  
11 standing to raise the issue and I have proper  
12 jurisdiction to determine the issue and that we don't  
13 spend hours and hours litigating an issue that is  
14 ultimately going to be determined to have been  
15 improperly before the Court at that time.

11:21AM

16 MR. PORTER: Two points and they certainly don't  
17 carry the day or anything like that. I don't know if  
18 the Court would like an update of where Rivera is right  
19 now. That case is up on appeal.

20 THE COURT: I saw that there was a notice of  
21 appeal filed July 3rd. That was the last thing that I  
22 saw.

11:22AM

23 MR. PORTER: The State has asked for expedited  
24 briefing, that has been opposed. I know the Court went  
25 ahead and set a regular briefing schedule. And the

JILL M. CUTTER, RPR  
(513) 785-6596

1 other is just -- off the top of my head, is just I  
2 wonder if there isn't some analogy here and I don't  
3 know if the Court has had to do an Adkins hearing yet  
4 for purposes of a death penalty case. In the ones I  
5 have been involved with, the Court has done the Adkins  
6 hearing prior to the mitigation hearing; arguably  
7 mental retardation, some logic there hopefully, the  
8 equivalent of a standing issue.

9 THE COURT: I just didn't see that issue raised at  
10 this point in time. Have you raised an Adkins issue?

11:23AM

11 MR. PORTER: We weren't here. I'm just saying --

12 THE COURT: By analogy?

13 MR. PORTER: By analogy is that the Supreme Court  
14 said in Adkins that you couldn't be sentenced to death  
15 or you couldn't be executed rather, excuse me, if you  
16 were mentally retarded. At least some of the cases,  
17 the ones I have been involved with, they have done the  
18 hearing prior to the actual mitigation.

19 THE COURT: I guess the distinction that I see off  
20 the top of my head is that that is a factor or  
21 characteristic about an individual defendant that can  
22 be determined prior to trial or prior to the mitigation  
23 phase in a case. Whereas, this really doesn't deal  
24 with any particular characteristic of this defendant.  
25 It deals with the constitutionality of the protocol

11:23AM

JILL M. CUTTER, RPR  
(513) 785-6596



1 used by the State in its lethal injection procedures.  
2 And the only way that this defendant would be affected  
3 by that is if the sentence of death were ultimately  
4 imposed in the case. And as I stated, that is  
5 certainly not a foregone conclusion because that is the  
6 entire purpose of us coming back here. And that  
7 whoever the sentencing authority is, is going to have  
8 to engage in the appropriate weighing pursuant to  
9 2929.03 before any determination like that is made.

10 MR. PORTER: And one additional update and I am  
11 sorry if I am going on, I don't mean to take up the  
12 Court's time.

11:24AM

13 THE COURT: Does the State have anything --

14 MR. PORTER: There is one additional ruling. I  
15 haven't gotten a chance to read it. I will -- it came  
16 out yesterday, and Ms. Cook has been forcing me this  
17 week to drive to and from the city every day so far  
18 this week, so I haven't had a chance to read it. Judge  
19 Frost has granted an evidentiary hearing in the middle  
20 of December for purposes of -- federal district for  
21 purposes of determining the applicability of Rees to  
22 Ohio procedures that --

11:25AM

23 THE COURT: All right.

24 MR. OSTER: Your Honor, just briefly, and probably  
25 confusing in retrospect, in looking back at the way the

JILL M. CUTTER, RPR  
(513) 785-6596

1 State filed their motions, motion C, which is now P,  
2 the state filed more to try to prevent an evidentiary  
3 hearing on the issue as opposed to really going into  
4 the issue itself. N, where it was requested for --

5 THE COURT: Right. It --

6 MR. OSTER: We do talk about whether or not the  
7 issue is ripe if it goes toward the standing issue.  
8 Obviously the standard in -- for something to be ripe,  
9 it can't be a future event that may not occur, that is  
10 anticipated, or may not occur at all. Standing at this  
11 point --

11:26AM

12 THE COURT: Ripeness issues.

13 MR. OSTER: -- justiciable by this Court.

14 THE COURT: And those are concerns that I had as I  
15 was looking at it. It was just something that I felt  
16 perhaps didn't get the initial attention they should  
17 have. I am not finding fault. I am just -- I looked  
18 at it for hours before it occurred to me that wait a  
19 minute, maybe we better be looking at that issue first.  
20 So what I would suggest is perhaps that we have some  
21 additional research and authority presented on that  
22 issue to determine whether or not that is something  
23 that should be heard prior to the mitigation phase or  
24 if it is something that would be entertained by this  
25 Court subsequently, or if it is something that, in

11:26AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 fact, that should be the subject of a separately filed  
2 suit if appropriate. I mean, I'm not sure which of  
3 those options or if that even encompasses the entire  
4 universe of options. I think it might be pertinent to  
5 have a little further research on that issue.

6 MR. PORTER: Would the Court set a date? I do  
7 better if the Court sets a date for purposes of  
8 submitting additional briefing.

9 THE COURT: That is fine. Is it something that we  
10 want to do in terms -- is there any reason why you  
11 wouldn't be able to file simultaneous argument on the  
12 issue? It is not something I see where you would  
13 necessarily go back and forth on it.

11:27AM

14 MR. OSTER: No objection.

15 MR. PORTER: We have no objection.

16 THE COURT: What is an appropriate amount of time,  
17 given your schedules?

18 (All counsel confer off the record.)

19 THE COURT: Has counsel had an opportunity to  
20 discuss what they would propose as a date for  
21 submitting further authority?

22 MR. OSTER: September 17th seemed to be agreeable  
23 to both sides.

24 THE COURT: All right. Joe, can I have a pretrial  
25 order? I will set that as a separate date. And then I

JILL M. CUTTER, RPR  
(513) 785-6596



1 assume we are going to want to argue that issue as  
2 well, correct?

3 MS. COOK-REICH: Yes, Your Honor.

4 MR. PORTER: Yes.

5 THE COURT: All right. Looking at the Court's  
6 schedule in October, it seems like one day is just as  
7 bad as another. I would like perhaps to deal with it  
8 prior to me getting into the O'Hara case. How about  
9 early in the afternoon on Friday, October 10th, after I  
10 conclude my criminal docket? That would give Mr.  
11 Porter some time to drive down that day and, you know,  
12 again being an oral argument issue on this one issue, I  
13 don't see where we would need to set aside a large  
14 block of time. I mean, I will put it down as an hour  
15 of docket time. Don't know that we would use all of  
16 that.

11:31AM

17 MS. COOK-REICH: That is fine with both of our  
18 calendars, Your Honor.

19 MR. PORTER: Just so I am adequately prepared, is  
20 this Court going to want argument just on the standing  
21 issue that day or will it want argument on the entire  
22 kit and caboodle for lack of a better term.

11:31AM

23 THE COURT: I feel that -- I mean, you have  
24 already briefed pretty thoroughly the other issues, so  
25 I think that any argument that you would have presented

JILL M. CUTTER, RPR  
(513) 785-6596

1 today on this, be prepared -- if it does turn out that  
2 he has standing, be prepared to go forward with those  
3 arguments as well. And we will just defer further  
4 action on this motion P and N until that date. I am  
5 going to set that at 1:30 PM. Will counsel approach  
6 and sign this pretrial order just setting that date?

7 I'm going to be doing my own research also, so at  
8 that point we can determine that issue with some  
9 finality that day, but in the event assuming arguendo,  
10 that there is a standing or a ripeness issue that would  
11 prevent the Court from considering it prior to  
12 sentencing, I would also like counsel to contemplate  
13 whether it would be appropriate to have some type of  
14 hearing after a verdict on sentence before this Court  
15 or whether it is really an issue that like many of  
16 these other cases is properly brought as a separate  
17 action either in the state or federal court.

11:34AM

18 It looks like Baze vs. Rees in state court in  
19 Kentucky, my research showed that a lot of the cases  
20 are brought up either on habeas or a 1983 action if  
21 they are only challenging the protocol itself. It  
22 looked like there were some different vehicles and I  
23 really haven't gotten that far to know which would be  
24 appropriate. So any input counsel would have on that  
25 issue would assist the Court.

11:34AM

JILL M. CUTTER, RPR  
(513) 785-6596

1 Counsel, given that we are going to be addressing  
2 L and M tomorrow, is there anything further that we  
3 need to take up today regarding the motions that we  
4 have already discussed or any other motions?

5 MS. COOK-REICH: Your Honor, Mr. Porter is trying  
6 to be very congenial and he is suggesting a possible  
7 resolution relative to our motions on the March 31st  
8 order, which are now up in the Ohio Supreme Court.  
9 Obviously, you have made statements that because that  
10 is pending there, you won't touch that particular  
11 issue. We certainly understand that. We are  
12 attempting to try to resolve that in the event that  
13 they agree that it is not a final appealable order, Mr.  
14 Porter might be requesting an evidentiary hearing on  
15 that, which is what we would have liked before it went  
16 that far as to whether or not they are so entitled to  
17 those records. He is suggesting a possible resolution  
18 that we would certainly consider withdrawing our  
19 pending motion and appeal before the Ohio Supreme Court  
20 if we are granted that evidentiary hearing which might  
21 put this back before the Court.

11:36AM

11:37AM

22 THE COURT: well, thank you for advising me.  
23 Again, I don't feel comfortable commenting on it one  
24 way or the other. But thank you for advising me that  
25 you're engaged in that analysis. Obviously, if it was

JILL M. CUTTER, RPR  
(513) 785-6596



1 a matter that I had authority to act on, I would  
2 consider it appropriately.

3 Is there anything else, then, or are we going to  
4 be back tomorrow morning on L and M?

5 MR. OSTER: There is nothing on behalf of the  
6 State. We have no motions.

7 MS. COOK-REICH: Your Honor, if I could have just  
8 one second. I have a notice from a witness that said  
9 that he would be available I thought it was 10:00  
10 tomorrow instead of 9:00. would the Court indulge us  
11 and allow us to begin at 10:00?

11:37AM

12 THE COURT: Any objection?

13 MR. OSTER: No, Your Honor.

14 THE COURT: All right. Let's restart tomorrow at  
15 10:00.

16 MS. COOK-REICH: Thank you, Your Honor.

17 MR. OSTER: Thank you, Your Honor.

18 THE COURT: In the meantime, we will be adjourned  
19 on this matter. we will see everybody here tomorrow  
20 morning at 10:00.

11:38AM

21 (Proceedings concluded at 11:38 a.m.)  
22  
23  
24  
25

JILL M. CUTTER, RPR  
(513) 785-6596

1  
2 STATE OF OHIO )

3 ) SS. REPORTER'S CERTIFICATE

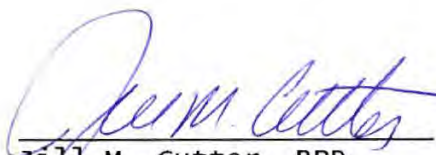
4 COUNTY OF BUTLER )

5 I Jill M. Cutter, RPR, do hereby certify that I am  
6 a Registered Professional Reporter and Notary Public within  
7 the State of Ohio.

8 I further certify that these proceedings were  
9 taken in shorthand by me and by electronic means at the time  
10 and place herein set forth and was thereafter reduced to  
11 typewritten form, and that the foregoing constitutes a true  
12 and accurate transcript, all done to the best of my skill and  
13 ability.

14 I further certify that I am not related to any of  
15 the parties hereto, nor am I in any way interested in the  
16 result of the action hereof.

17 Dated at Hamilton, Ohio, this 29 day of March,  
18 2009.

19  
20   
21 Jill M. Cutter, RPR  
22 Official Court Reporter  
23 Butler County Common Pleas  
24 Hamilton, Ohio 45011  
25

JILL M. CUTTER, RPR  
(513) 785-6596